DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-577
Title: Akio Kawashima, et ux., Petitioners
v.
Eric H. Holder, Jr., Attorney General
Docketed: November 2, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-74313, 05-74408)
Decision Date: August 4, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 1 2010	Petition for a writ of certiorari filed. (Response due December 2, 2010)
Nov 23 2010	Order extending time to file response to petition to and including January 3, 2011.
Dec 23 2010	Order further extending time to file response to petition to and including February 2, 2011.
Jan 28 2011	Order further extending time to file response to petition to and including March 4, 2011.
Mar 4 2011	Order further extending time to file response to petition to and including April 4, 2011.
Apr 4 2011	Brief of respondent Eric H. Holder, Jr., Attorney General in opposition filed. tbp
Apr 5 2011	Motion to defer consideration of the petition for a writ of certiorari filed by petitioners.
Apr 18 2011	Reply of petitioners Akio and Fusa[illegible]o Kawashima filed.
Apr 19 2011	DISTRIBUTED for Conference of May 12, 2011.
May 16 2011	DISTRIBUTED for Conference of May 19, 2011.
May 23 2011	Petition GRANTED limited to Question 1 presented by the petition.
Jun 17 2011	Order extending time to file the joint appendix and petitioners' brief on the merits to and including August 5, 2011.
Jun 17 2011	The time to file respondent's brief on the merits is extended to and including September 29, 2011.
Jul 28 2011	Motion to dispense with printing the joint appendix filed by petitioner Akio Kawashima, et ux.
Aug 5 2011	Brief of petitioners Akio Kawashima, et ux. filed.
Aug 8 2011	SET FOR ARGUMENT ON Monday, November 7, 2011.
Aug 12 2011	Brief amici curiae of National Immigration and Criminal Defense Organizations filed.
Aug 12 2011	Brief amicus curiae of Johnnie M. Walters filed.
Aug 12 2011	Brief amici curiae of Asian American Justice Center, et al. filed.
Aug 15 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Aug 15 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope). This record also includes

	the administrative record from the U.S. Department of Justice.
Aug 19 2011	CIRCULATED.
Sep 29 2011	Brief of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Oct 28 2011	Reply of petitioners Akio and Fusako Kawashima filed. (Distributed)
Nov 7 2011	Argued. For petitioners: Thomas J. Whalen, Washington, D. C. For respondent: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,

Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

Thomas J. Whalen*
* *Counsel of Record*
Edward J. Longosz, II
Mark A. Johnston
Jeffrey W. Larroca
Eckert Seamans Cherin &
Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Akio Kawashima and his wife, Fusako Kawashima, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The final opinion of the Ninth Circuit denying Petitioners' motion for rehearing and rehearing *en banc* appears in the appendix (Pet. App. A, 1a-31a)* to this petition and is reported at 615 F.3d 1043. Also appearing in the appendix are the initial decision of the Ninth Circuit (Pet. App. D, 83a-100a), reported at 503 F.3d 997; the Court's decision following rehearing (Pet. App. C, 53a-82a), reported at 530 F.3d 1111; and the decision withdrawing the Court's prior opinion (Pet. App. B, 32a-52a), reported at 593 F.3d 979.

The decision of the United States Immigration Judge denying Petitioners' motion to terminate (Pet. App. E, 101a-106a), the Immigration Judge's order of removal (Pet. App. F, 107a), and the denial of Petitioners' appeal to the Board of Immigration Appeals (Pet. App. G, 108a) are also included in the appendix to this petition.

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* Petitioners' Appendix is referred to and cited herein as "Pet App. _,_a."

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 27, 2010. Pet. App. B, 32a-52a. The Ninth Circuit denied Mr. and Mrs. Kawashima's petition for rehearing and for rehearing *en banc* on August 4, 2010. Pet. App. A, 1a-31a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in the appendix to this petition. Pet. App. H, 109a-114a. Those provisions state in relevant part:

> **8 U.S.C. § 1101(a)(43)(M)**
>
> [an aggravated felony is] an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in §7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

26 U.S.C. § 7206

Any person who –

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . .

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Federal Rule of Appellate Procedure 41

Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

STATEMENT OF THE CASE

Akio Kawashima and Fusako Kawashima (the "Kawashimas") are natives and citizens of Japan.[1] The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984. The Kawashimas established a successful Japanese Restaurant in California, Cho Cho San, owned by Nihon Seibutsu Kagaku Center, Inc. ("NSC"). Mr. Kawashima owned a portion of the shares of NSC. In 1992, Mr. Kawashima signed a U.S. Corporate Tax return on behalf of NSC for the tax year ending October 31, 1991, under the penalty of perjury.

In 1997, Mr. Kawashima was charged with subscribing to a false statement on a corporate tax return, in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima was charged with aiding and assisting in the preparation of a false statement on a tax return, in violation of § 7206(2).[2] On August 11, 1997, Mr. Kawashima pled guilty to one count in violation of § 7206(1). Also, on August 11, 1997, Mrs. Kawashima pled guilty to one count in violation of § 7206(2).

In his plea agreement negotiated by his counsel, Mr. Kawashima stipulated that he "knew that the return was materially false in that it failed

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[1] Aiko Kawashima is referred to as Mr. Kawashima and Fusako Kawashima is referred to as Mrs. Kawashima herein.

[2] All references to code sections are to Title 26 unless otherwise noted.

to report all of the taxable income that NSC earned during the taxable year ended October 31, 1991." Pet. App. I, 119a. In her plea agreement, Mrs. Kawashima stipulated that she "acted willfully in assisting her husband to underreport income" on the corporate tax return. Pet. App. J, 130a.

Mr. Kawashima stipulated that the total actual tax loss was $245,126.[3] The plea agreement for sentencing purposes further stipulated that Mr. Kawashima could be ordered to pay that amount in restitution. However, in their plea agreements, there was no admission of fraud or deceit by either Mr. Kawashima or Mrs. Kawashima.

On August 3, 2000, the Immigration and Naturalization Service (now the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security) issued separate notices to appear, alleging that Mr. and Mrs. Kawashima were removable (deportable)[4] because their convictions under §§ 7206(1) and (2)

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3 The "actual tax loss" for sentencing purposes as stated in the plea agreement was the gross amount of income omitted and not reported on the tax return. "Actual tax loss" for sentencing purposes does not include any allowable deductions to arrive at a net income figure against which the applicable tax rate is applied, which then would constitute the "actual" revenue loss to the Government. *United States v. Valentino*, 19 F.3d 463, 466 (9th Cir. 1994) (unclaimed allowable depreciation deduction not considered for a 7206(1) conviction); *United States v. Chavin*, 316 F.3d 666, 677 (7th Cir. 2002) (unclaimed allowable deductions not considered).

4 Aliens convicted of an aggravated felony after admission are deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i).[5]

Section 1101(a)(43)(M) defines "aggravated felony" as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The notices did not allege that the Kawashimas' convictions constituted aggravated felonies for tax evasion under 8 U.S.C. § 1101(a)(43)(M)(ii).[6]

After a removal hearing, the Immigration Judge ("IJ") concluded that Mr. and Mrs. Kawashima's convictions of these tax offenses were "aggravated felonies" under (M)(i) and ordered them removed to Japan. The Kawashimas appealed the decision. The Board of Immigration Appeals ("BIA") at first remanded because of procedural defects. After further proceedings, the IJ denied the Kawashimas' motion to terminate the proceeding and ordered them removed. Pet. App. E, 106a. The

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[5] Hereinafter, "(M)(i)."

[6] Hereinafter, "(M)(ii)."

BIA affirmed, adopting the IJ's decision. Pet. App. G, 108a.

The Kawashimas timely filed separate petitions for review in the United States Court of Appeals for the Ninth Circuit. The Kawashimas sought review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen, which were consolidated under 8 U.S.C. § 1252(b)(6). In a decision filed September 18, 2007, the Ninth Circuit denied Mr. Kawashima's petition, holding that the Kawashimas' convictions under §§ 7206 (1) and (2) "necessarily 'involve fraud or deceit'" because the provisions require the Government to prove that the Kawashimas acted "willfully." *Kawashima v. Gonzales*, 503 F.3d 997, 1000 (9th Cir. 2007) ("*Kawashima I*"). Pet. App. D, 92a. The Ninth Circuit held that the language of (M)(i) was clear. *Id.* at 89a. The Court also held that the Government was a qualifying "victim," that the tax loss in excess of $10,000 satisfied the monetary "loss" requirement of (M)(i), and concluded that "because such interpretation does not lead to an absurd or unreasonable result, our inquiry must end." *Id.* at 87a. Notwithstanding, the Court acknowledged that the United States Court of Appeals for the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004). *Id.* at 88a.[7]

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[7] The Ninth Circuit agreed with the dissent of Judge (now Justice) Alito in *Ki Se Lee* which concluded that "the plain text of (M)(i) did not preclude the inclusion of tax offenses within its definition of aggravated felonies." Pet. App. D, 88a (*citing Ki Se Lee*, 368 F.3d at 226).

As to Mrs. Kawashima, the Court granted the petition because under the modified categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), the Court was unable to conclude that Mrs. Kawashima's conviction resulted in a loss to the Government in excess of $10,000. *Id.* at 94a-95a.

The Kawashimas then petitioned the Ninth Circuit for rehearing, which was granted. The Court, in a *per curiam* decision, withdrew its 2007 decision and held that, using the modified categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), (M)(i) required that the crime of conviction establish a loss in excess of $10,000, which the Kawashimas' convictions did not so establish. *Kawashima v. Mukasey*, 530 F.3d 1111, 1118 (9th Cir. 2008) ("*Kawashima II*"). Pet. App. C, 66a. Accordingly, the Kawashimas were not to be deported.

The Government then filed a petition for rehearing with respect to *only* Mr. Kawashima. The Government did not seek rehearing of the court's decision granting Mrs. Kawashima's petition. While the Government's petition for rehearing was pending, this Court granted certiorari in *Nijhawan v. Attorney General*, 523 F.3d 387 (3d Cir. 2008), *cert. granted sub nom. Nijhawan v. Mukasey*, 129 S. Ct. 988 (2009). The Government then requested the Ninth Court to stay any consideration of its petition for rehearing until this Court decided *Nijhawan*. After the Court issued its decision in *Nijhawan v. Holder*, 129 S Ct. 2294 (2009), the Ninth Circuit

ordered the parties to file supplemental briefs on *Nijhawan*'s impact on the pending Kawashima case.

After receiving supplemental briefs, the Ninth Circuit withdrew its prior decision in *Kawashima II* and held that the tax convictions of Mr. and Mrs. Kawashima were aggravated felonies, subject in Mrs. Kawashima's case to an evidence review indicating that the loss to the Government was in excess of $10,000. *Kawashima v. Holder*, 593 F.3d 979, 981, 985-87, 989 (9th Cir. 2010) ("*Kawashima III*"). Pet. App. B, 33a, 43a-46a, 52a. The Court held that "according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which the tax loss to the government exceeds $10,000 constitute aggravated felonies under subsection (M)(i)." *Id.* at 39a (*citing Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008), *cert. denied sub nom. Arguelles-Olivares v. Holder*, 130 S. Ct. 736 (2009)). This Court in *Nijhawan* held that the crime of conviction under 8 U.S.C. § 1101(a)(43) does not require the factfinder deciding guilt to find a loss of $10,000 as an element of the crime. *Nijhawan*, 129 S Ct. at 2298. It is rather a "particular circumstance" which can be determined by the evidence in the case. *Id.*

Accordingly, Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's removal order was denied. Pet. App. B, 52a. The Court also remanded Mrs. Kawashima's case to the BIA, even though the Government never sought rehearing of the Court's 2007 decision in *Kawashima II* in which the Ninth Circuit granted Mrs. Kawashima's petition and found her non-removable. *Id.* In its

decision, the Ninth Circuit stated that "although it is true that the Government did not ask us to reconsider our resolution of Mrs. Kawashima's case, we are entitled to do so as we have not yet issued our mandate in this case. As such, our decision remains subject to modification, either at the request of a party or *sua sponte*." *Id.* at 45a n.8. With respect to Mrs. Kawashima, the Ninth Circuit remanded her case to the BIA "so that it may determine in light of the Supreme Court's holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the Government as a result of Mrs. Kawashima's crime." *Id.* at 49a.

The Kawashimas timely filed a petition for rehearing and rehearing *en banc* which was denied on August 4, 2010. The Court ordered that its opinion in *Kawashima III* be withdrawn and the Court filed a new opinion contemporaneously with the filing of the Order denying rehearing. *Kawashima v. Holder*, 615 F.3d 1043, 1046 (9th Cir. 2010) ("*Kawashima IV*"). Pet. App. A, 2a.

The Ninth Circuit, for the most part, reiterated its holding in *Kawashima I* and *Kawashima III*, that the crimes of which the Kawashimas were convicted were aggravated felonies under (M)(i). The Court also held that while judgment was entered in favor of Mrs. Kawashima in 2007, which the Government did not seek to review in its petition for rehearing, the Court could *sua sponte* "amend the judgment" in 2010 because it had not issued its mandate. Pet. App. A, 23a n.7. The Court reversed its decision in *Kawashima II* that Mrs. Kawashima should not be deported and

remanded the case to the BIA to determine whether the evidence in the record was sufficient to establish the total loss to the Government as a result of Mrs. Kawashima's crime. *Id.* at 27a.

Three judges of the Ninth Circuit dissented from the denial of the rehearing *en banc*. *Id.* at 3a-12a.

REASONS FOR GRANTING THE PETITION

The Kawashimas face deportation due to the Ninth Circuit's erroneous interpretation of 8 U.S.C. § 1101(a)(43)(M)(i) which is in direct conflict with a decision of the Third Circuit. As a result, if Mr. and Mrs. Kawashima were residents of Pennsylvania, New Jersey or Delaware, the plea agreements to which they stipulated would have concluded the proceeding with finality and resulted in no further punishment, having paid their debt for any wrongdoing. Instead, they face in addition the irreversible sanction of exile because of an ambiguous statute which has divided Circuit Judges of the United States Courts of Appeals.

The crimes to which the Kawashimas pled guilty did not have fraud or deceit as an element of the crime of conviction and, therefore, cannot fall within the ambit of M(i). In any event, the application of the time-honored rules of statutory construction point to a conclusion that tax evasion is the only tax crime which Congress designated as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M). At worse, this is a classic case for the application of the rule of lenity in the face of this ambiguous statute in favor of the alien.

Accordingly, this Court needs to bring uniformity to this important national immigration issue. In this case, the Ninth Circuit has rendered a decision on an issue of national importance in direct conflict with the decision of the Third Circuit in *Ki Se Lee*, 368 F.3d 218 (3d Cir. 2004). Sup. Ct. R. 10(a). Further, the Ninth Circuit in this case, and

the Third and Fifth Circuits in separate decisions, have decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). For these reasons and the reasons set forth herein, this petition for certiorari should be granted.

I.

In Conflict with the Third Circuit, the Ninth Circuit Erred in Holding that the Kawashimas' Convictions under 26 U.S.C. §§ 7206(1) and (2) were Aggravated Felonies Pursuant to 8 U.S.C. § 1101(a)(43)(M)(i).

The issue in this case is whether tax crimes of which the Kawashimas were convicted under 26 U.S.C. §§ 7206(1) and (2) are "aggravated felonies" under 8 U.S.C. § 1101(a)(43)(M)(i). The Ninth Circuit acknowledged a Circuit split on this issue, noting "[w]e recognize that a divided panel of the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004)." *Kawashima IV*, Pet. App. A, 39a.

Every Circuit that has ruled on this issue has divided on the issue. *See, e.g., Ki Se Lee*, 368 F.3d 218, 225 (3d Cir. 2004) (Alito, J., dissenting); *Arguelles-Olivares*, 526 F.3d at 180 (Dennis, J., dissenting); *Abreu-Reyes v. INS*, 292 F.3d 1029, 1034 (9th Cir. 2002) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966 (2003). Furthermore, the division of views on this issue is magnified by the strong dissenting

opinion of Judge Graber (joined by Judges Wardlaw and Paez) in the case at bar, dissenting from the denial of the Kawashimas' request for a rehearing *en banc*. *See Kawashima IV*, Pet. App. A, 3a-12a. The ambiguities concerning this important federal statute are further illustrated by the fact that the Ninth Circuit has issued no less than four opinions in this case (*Kawashima I* through *IV*).

A. 8 U.S.C. § 1101(a)(43)(M)(i) is Unclear and Ambiguous.

Although the Ninth Circuit holds to the view that (M)(i) is "clear and unambiguous," the difference of opinion among the Circuits certainly demonstrates otherwise. Last term, the Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), held that the consequences of deportation are so catastrophic that a defendant is denied effective assistance of counsel under the Sixth Amendment if his criminal attorney does not advise him of the consequence of pleading guilty to an offense where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction." 130 S. Ct. at 1483 (citation omitted). The Court recognized:

> There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain . . . When the law is not succinct and straightforward (as it is in many of the scenarios stated by Justice Alito), a criminal defense attorney need do no

> more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.

Id.

In his concurrence, joined by the Chief Justice, Justice Alito stated, "[m]ost crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as crimes involving *moral turpitude or aggravated felonies*." *Id.* at 1488 (Alito, J., concurring) (quotation omitted) (emphasis in original). Justice Alito further stated that, "determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude [(CIMT)]' is not an easy task." *Id.* (citation omitted). The Court in *Padilla*, as well as the Concurring Justices, agreed that deportation is a "particularly severe penalty" requiring advice of counsel and that with the advice of counsel, a defendant can plead guilty to a non-removable, lesser included offense. *Id.* at 1481 (*citing Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

There is nothing in the record, one way or the other, as to whether the Kawashimas plea-bargained to a tax offense that they believed was not a removable offense. The Kawashimas' plea agreements did not contain any admission that fraud or deceit was involved, which are not necessary elements for conviction under § 7206(1), or § 7206(2). Indeed, in line with the observations of Justice Alito

in *Padilla*, counsel to the Kawashimas in the criminal proceeding may very well have negotiated guilty pleas to §§ 7206(1) and (2) so that the Kawashimas would not be subject to deportation for tax evasion. As Justice Alito correctly pointed out, whether a particular crime falls "under a broad category of crimes" like (M)(i) "is not an easy task." *Padilla*, 130 S. Ct. at 1488. Petitioners submit that (M)(i) is not "clear and explicit" and that the Ninth Circuit was wrong to hold that (M)(i) was clear and unambiguous.

The decision of the Ninth Circuit is an important, disputed question of law that this Court should address and bring uniformity to the law. It is also vitally important to the Kawashimas, who have been in the United States since 1984 and who are now on the brink of being deported because they pled guilty to tax crimes which, it is submitted, are not aggravated felonies under (M)(i), a statute which is not "succinct, clear and explicit."

The dissent of Judge Graber to the denial of Petitioners' petition for rehearing *en banc* in this case articulates, in very strong and cogent terms, why 8 U.S.C. § 1101(a)(43)(M) is not clear and unambiguous on the issue of whether convictions under §§ 7206(1) and (2) were intended by Congress to be within (M)(i). Pet. App. A, 3a-12a.

B. The Ninth Circuit Failed to Apply Long-Established Canons of Statutory Construction to Determine the Intent of Congress.

This Court has held, as a cardinal rule of statutory construction, that a statute should be considered as a whole and that significance and effect be accorded to every word. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). As Professor Singer has written in his text:

> It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all provisions so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error. No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to preserve all the words of the statute.

J.D. Shambie Singer, *Statutes and Statutory Construction* § 46.6 (7th ed. 2007) (quotations and citations omitted); *see also Corley v. United States*, 129 S. Ct. 1558, 1561, n.5 (2009) (it is a "cardinal rule that a statute is to be read as a whole") (*quoting King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)); *FDA v. Brown & Williamson Tobacco Corp.*,

529 U.S. 120, 132 (2000) ("[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

Ignoring these bedrock principles of statutory construction in reaching its decision in *Kawashima IV*, the Ninth Circuit focused solely on (M)(i), as if (M)(ii), a parallel provision, did not exist. Section (M)(i) deals with general "losses" from fraud and deceit claims; (M)(ii) applies to specific losses, namely "revenue losses to the Government." Pet. App. A, 6a. As Judge Graber pointed out in her dissent, "[t]he panel forcefully defends its conclusion that the meaning of subsection (i) is 'plain' for the simple reason that each and every other indication of congressional intent points to the opposite conclusion: Congress intended subsection (ii), and not subsection (i), to cover tax crimes." *Id.* As Judge Graber also observed, to ignore a parallel provision as if it does not exist is simply contrary to basic principles of statutory construction. *Id.* at 6a-8a.

If a conviction of tax evasion "necessarily" involved fraud or deceit under § 7201 and was intended to be included in (M)(i), (M)(ii) would be rendered superfluous. Judge (now Justice) Alito advanced in *Ki Se Lee* that Congress may have added (M)(ii) specifically to cover tax evasion in violation of § 7201, because that tax crime may not be covered in (M)(i). *Ki Se Lee*, 368 F.3d at 227 (Alito, J., dissenting). Judge Alito noted that neither fraud nor deceit was an essential element of tax evasion and that "leading cases interpreting the language [of the tax evasion statute] do not hold that fraud or deceit is an element of the offense." *Id.*

Similarly, the Government, in opposition to the petition for writ of certiorari in *Arguelles-Olivares*, also took the position that 26 U.S.C. § 7201 does not include fraud or deceit as an element of the offense. (Govt. Br. Opp'n at 9.)[8]

Thus, it is completely illogical to say that convictions under § 7201 involving an attempt to evade (*de facto* fraud) may not be covered in (M)(i), but §§ 7206(1) and (2) convictions are covered in (M)(i) which do not have fraud or deceit as an element of the crime.

The Ninth Circuit recognized that its construction of (M)(i) rendered (M)(ii) superfluous, but speculated, without any legislative or statutory basis at all, that it was *conceivable* that Congress intended a superfluous provision, in disregard of long established canons of statutory construction, to determine the intent of Congress. *Kawashima IV*, Pet. App. A, 19a-20a.

The Ninth Circuit's speculation is unavailing, for the reasons set forth by Judge Paez in his *Abreu-Reyes* dissent:

> [A]s the statute reflects, Congress drew a distinction between tax offenses and other crimes involving fraud and deceit. Congress then targeted only the more

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8 The petitioner in *Arguelles-Olivares* sought review by this Court primarily on the issue which was subsequently resolved by this Court in *Nijhawan*, 129 S Ct. 2294 (2009).

> egregious act of tax evasion, and only when the loss to the government exceeds $ 10,000, as sufficiently serious to warrant removal. . . If Congress intended for tax crimes other than tax evasion to constitute aggravated felonies when the loss to the government exceeds $ 10,000, it could have easily defined an aggravated felony in 8 U.S.C. § 1101(a)(43)(M)(ii) as any "tax offense in which the revenue loss to the Government exceeds $ 10,000" or identified each relevant section of Title 26.

292 F.3d 1029, 1037-38 (citations omitted) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966. Giving effect to both (M)(i) and (M)(ii), as the Third Circuit held in *Ki Se Lee* and as Judge Graber advocated in this case, supports the conclusion that (M)(ii) deals with the only tax crime that is an "aggravated felony," namely tax evasion.

As a matter of construction, (M)(i) addresses "loss" to a victim or victims, while (M)(ii) addresses "revenue loss" to the Government. The express language is indicative of two separate categories of crimes. Subsection (M)(i) addresses crimes based upon fraud and deceit in which victims suffer a loss in excess of $10,000. Subsection (M)(ii) does not describe the Government as a "victim." Congress carefully chose to describe the crime of tax evasion as one involving a revenue loss to the Government. Although some cases have inappropriately described

the Government as a "victim" in tax cases, (M)(ii) does not.

A corollary to the canon that a statute should not be construed to make any provision superfluous is the rule that general words followed by specific words limit the breadth of the general words. Illustrative of this principle is this Court's decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981). In that case, this Court upheld the IRS denial of a § 501(c)(3) exemption application on the basis of § 501(e), stating that: "... it is a basic principle of statutory construction that a specific statute ... controls over a general provision ... particularly when the two are interrelated and closely positioned ... ." *Id.* at 6. In this case, (M)(ii) limits (M)(i) or, stated another way, (M)(ii) pulls tax offenses involving "revenue losses" like § 7201 from "general losses" to victims. "The doctrine of *ejusdem generis* is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute and other legal instruments can be given effect, all parts of a statute can be construed together and no words will be superfluous." *See* Singer, *supra*, § 47.17 (citations omitted). Section (M)(i) deals with losses resulting from criminal/tort-like actions based upon fraud or deceit and not revenue losses to the Government, which is addressed by M(ii). The different description of "loss" in these parallel provisions, as well as the rule of statutory construction that the "specific governs the general," point to the conclusion that tax crimes

involving a revenue loss to the Government are not within (M)(i), but are covered in (M)(ii).[9]

The Ninth Circuit's reasoning, and therefore holding, in *Kawashima IV* has not changed since *Kawashima III*. Given the stakes for the Kawashimas, their fate in the Ninth Circuit has rested on a construction of a statute in violation of long-established canons of statutory construction. Furthermore, as Judge Graber stated: "The panel's interpretation is inconsistent with other canons of construction, including the standard caveat that the specific governs over the general and the rule that an ambiguous statute should be construed in the alien's favor." *Kawashima IV*, Pet. App. A, 5a. The Ninth Circuit disregards, without explanation or basis, the principles of this Court that unclear statutes affecting deportation should not be construed against an alien.

It should also be noted the Ninth Circuit in *Kawashima IV* chose not to reiterate the dubious principle of law invoked in *Kawashima III*, as applicable to these aliens on the brink of deportation. "That because [the Ninth Circuit's]

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[9] In *Nijhawan*, this Court had occasion to look at (M)(i) and (M)(ii) in the context of examples of a circumstance specific approach. 129 S. Ct. at 2301-02. The Court referred to (M)(ii) as "the internal revenue provision." *Id.* at 2301. Regarding (M)(i), this Court said "[w]e recognize, as petitioner argues, that Congress might have intended subparagraph (M)(i) to apply almost exclusively to those who violate certain state fraud and deceit statutes. So we have examined state law." *Id.* at 2302. This Court listed the kind of tort-like crimes based upon fraud and deceit which would be captured by (M)(i).

interpretation does not lead to an absurd or unreasonable result, our inquiry must end." *Kawashima III*, Pet. App. B, 39a. This principle is contrary to this Court's emphatic jurisprudence that courts must apply the long-established canons of statutory construction to arrive at the intention of Congress. A court's construction of a statute which is not "absurd" or not "unreasonable" is not sufficient.

C. The Crimes to Which the Kawashimas Pled Guilty did not Involve Fraud or Deceit.

The Ninth Circuit found that because Mr. Kawashima acted "willfully" with specific intent to violate the law, his conviction under § 7206(1) "necessarily involved fraud or deceit." *See Kawashima I*, Pet. App. D, 87a, 92a.; *Kawashima IV*, Pet. App. A, 22a (*citing Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting)). Such a holding is contrary to the seminal tax case of *United States v. Bishop*, 412 U.S. 346 (1973). In *Bishop*, this Court held that "willfully" is an element of *all* tax crimes in 26 U.S.C. §§ 7201-7207. *Bishop*, 412 U.S. at 361. However, this Court has never said, in *Bishop* or in another case, that "willfully" equates with fraud and/or deceit.

Guided in part by this Court's decision in *Bishop*, the Tax Court in *Wright v. Commissioner*, 84 T.C. 636 (1985), and then the Ninth Circuit in *Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982), reversed their own previous decisions and held that fraud is not a necessary element of §

7206(1), a holding in which the Commissioner of Internal Revenue has acquiesced. Commissioner's Acquiescence, 1988-2 C.B. 1, 1988 IRB Lexis 3924. The Ninth Circuit stated in *Considine*:

> The Supreme Court acknowledged in Bishop that sections 7201 and 7206 (1) each require "willful" perpetration of a different act. 412 U.S. at 360 n.8, 93 S. Ct. at 2017 n.8. The express language of section 7201 requires an intent to avoid tax (a legitimate synonym for fraud). Section 7206 (1) (false return), however, does not require any fraudulent intent. Because section 7206 (1) does not require a willful attempt to evade tax, a conviction under Section 7206 (1) without more, does not establish "fraudulent intent."

683 F.2d at 1287 (citations omitted). The Tax Court in *Wright* found that a conviction under § 7206(1) does not collaterally estop the taxpayer from disputing fraud, which is a required element of 26 U.S.C. § 6653 (b)(1):

> [T]he intent to evade taxes is not an element of the crime charged under section 7206 (1). Thus, the crime is complete with the knowing, material falsification, and a conviction under section 7206 (1) does not establish as a matter of law that the taxpayer violated the legal duty with an intent, or in an attempt, to evade taxes.

84 T.C. at 643 (citations omitted); *see also* Laurence Goldfein and Farley P. Katz, *Expanded Application of 7206(1) Includes the Failure to Report Gross Receipts*, 52 J. Tax'n 94 (1980) (discussing the pre-*Considine* analysis of § 7206).

In reaching its decision in *Kawashima IV*, the Ninth Circuit cited its prior decision in *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990), where the court said: "The Supreme Court has repeatedly held that in order to make out a 'willful violation' of section 7206(2) the government must prove defendants acted with specific intent to defraud the government in the enforcement of its tax laws." Pet. App. A, 24a. In *Salerno*, the Ninth Circuit cited numerous Supreme Court cases for this proposition, none of which held that "willfulness" is "fraud." 902 F.2d at 1432. In fact, this Court has never expressly held that fraud or deceit was an element of a tax crime.

Most courts and commentators, including the U.S. Tax Court, regard a violation of § 7201, "tax evasion," as a case of "*de facto*" fraud, that "fraud" is found in the "intention to evade." *See, e.g., Chen v. Commissioner*, T.C.M. 2006-160, 2006 Tax Ct. Memo LEXIS 163, at *8 (August 8, 2006). In contrast, Section 7206(1) is the traditional vehicle used by the Government when it does not have sufficient evidence to establish "tax evasion" under § 7201, characterized by this Court as "the capstone of a system of sanctions" calculated to induce compliance with the income tax law. *Spies v. United States*, 317 U.S. 492, 497 (1943); *accord Boulware v. United*

States, 552 U.S. 421, 424 (2008). "Willfulness" in attempting to evade or defeat any tax has been viewed as tax fraud. However, a violation of § 7206(1) is not. Simply stated, a conviction under either §§ 7206(1) or (2) does not "necessarily" implicate fraud or deceit.

In *Wright*, the Tax Court recognized that § 7201 contained a fraud element in that the taxpayer attempted to evade taxes. 84 T.C. at 642 (citation omitted). Section 7206 serves a different purpose as the Tax Court stated:

> In a criminal action under section 7206(1), the issue actually litigated and necessarily determined is whether the taxpayer voluntarily and intentionally violated his or her known legal duty not to make a false statement as to any material matter on a return. The purpose of section 7206(1) is to facilitate the carrying out of [the IRS's] proper functions by punishing those who intentionally falsify their Federal income tax returns and the penalty for such perjury is imposed irrespective of the tax consequences of the falsification.

Id. at 643 (citations omitted).

Looking at the language §§ 7206(1) and (2), it can be seen that these subsections are essentially perjury statutes in the context of tax enforcement. Revenue loss to the Government or to any one else is

immaterial. *See United States v. Di Varco*, 484 F.2d 670, 672-73 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) (where the correct income was reported but the source of the income was falsely reported).

In fact, the Government, as did the Third Circuit in *Bobb v. Attorney General*, took the same position that Petitioners argue in this case, that an intent to defraud or deceive must be an element of a crime covered by (M)(i). 458 F.3d 213, 219 (3d Cir. 2006). In the same vein, the Third Circuit in *Nugent v. Ashcroft*, "determined that Nugent's theft by deception fell within the purview of subsection (M)(i) *because* it required the Commonwealth to prove fraud and deceit." 367 F.3d 162, 178 (3d Cir. 2004) (emphasis added); *see also Valansi v. Ashcroft*, 278 F.3d 203, 217 (3d Cir. 2002).

Mr. Kawashima pled guilty to "willfully" making a false statement on a corporate tax return, and Mrs. Kawashima pled guilty to "willfully" assisting her husband. There was no finding or admission of fraud or deceit by the Kawashimas in their plea agreements. For the Government's part, the Government was not required to establish fraud, or obtain a stipulation of fraud, for convictions under either §§ 7206(1) and (2), and the Government did not do so in this case. The plea agreement, negotiated with the Government for both Kawashimas, did not admit fraud or deceit, and such an admission or stipulation was not a prerequisite to a conviction under §§ 7206(1) or (2).

As neither fraud nor deceit are essential elements of a conviction under §§ 7206(1) and (2),

and as neither of the Kawashimas admitted an intent to defraud, the Kawashimas' convictions do not come within (M)(i), even if tax crimes were included in (M)(i)'s scope. However, a conviction of an attempt to evade taxes has been recognized as fraud. Accordingly, as discussed *supra*, if a tax crime based upon fraud or deceit was intended by Congress to be included in (M)(i), there was no need to include a § 7201 conviction in (M)(ii) as an aggravated felony. Rather, Congress made tax evasion, the "capstone" of tax crimes, the only tax crime which is an aggravated felony deserving of deportation.

D. The Ninth Circuit Violated the Rule of Lenity in Construing the Ambiguous Statutory Provision of 8 U.S.C. § 1101(a)(43)(M)(i) Against the Kawashimas.

The Ninth Circuit's conclusion that (M)(i) is clear and unambiguous is incorrect. The fact that there was a direct conflict between *Ki Se Lee* and the Ninth Circuit evidences uncertainty of application. It is well-settled that lingering ambiguities in deportation statutes should be construed in favor of the alien. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (*quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Given the split between the Third and Ninth Circuits, as well the divided panels in the Third, Fifth and Ninth Circuits which have heard this issue, Subsection (M)(i) is clearly ambiguous, as an empirical matter, and the rule of lenity must apply.

In *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), this Court rejected an administrative interpretation of a deportation provision and unanimously resolved the ambiguity in the alien's favor, holding:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.*

Id. at 10 (citation omitted) (emphasis added); *see also St. Cyr*, 533 U.S. at 320 (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at 449 (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien"). The rule of lenity is to be applied "when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994).

Deportation for conviction of an aggravated felony constitutes a sentence of life-time banishment. *See Cardoza-Fonseca*, 480 U.S. at 449

("[d]eportation is always a harsh measure"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (deportation is a "drastic measure" where the "stakes are considerable for the individual"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living").

In the recent decision of *United States v. Hayes*, 129 S. Ct. 1079 (2009), this Court considered whether a prior conviction for battery violated the federal Gun Control Act of 1968's prohibition on possession of a firearm by convicted felons to include persons convicted of "a misdemeanor crime of domestic violence" pursuant to 18 U.S.C. § 922(g)(9). *Hayes*, 129 S. Ct. at 1082. The issue was whether Hayes's prior conviction qualified as a predicate offense under U.S.C. § 922(g)(9) because West Virginia's generic battery law did not designate a domestic relationship between aggressor and victim as an element of the offense. *Hayes*, 129 S. Ct. at 1083. The Court, after reviewing express language and legislative history of the statute, held that a domestic relationship need not be a defining element of the predicate offense. *Id.* at 1088. Writing in dissent, Chief Justice Roberts (joined by Justice Scalia) observed that "[t]his is a textbook case for application of the rule of lenity." *Id.* at 1093 (Roberts, C.J., dissenting). The Chief Justice reasoned that the rule of lenity should apply where there was no fair warning to the offender because there was nothing wrong with the conduct in question (firearm possession) if the prior misdemeanor (battery) was not covered by the statute:

> If the rule of lenity means anything, it

> is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority.

Id.

In the present case, the Kawashimas should not be subject to deportation for failing to conduct an exhaustive survey of interpretations of (M)(i) prior to pleading guilty to §§ 7206(1) and (2) offenses. Indeed, such a search would not have provided them with any clarity on the issue. The Kawashimas present "a textbook case for application of the rule of lenity."

In addition, the ambiguity of the statute, 8 U.S.C. § 1101(a)43(M), and the existing conflict among three circuits, raise fundamental issues of due process and fair notice. With exile and deportation at issue, due process and fair notice require that a statute clearly set forth prohibited conduct. No criminal or civil enforcement action may be brought under a vague statute or a statute's "new" interpretation. *See, for example, Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1331 (D.C. Cir. 1995).

As a matter of fair notice and due process, the Court should apply the rule of lenity. The penalties would be severe and irreversible for the Kawashimas if the rule of lenity were not applied in their cases. Where doubt exists, as in this case, as to the scope of (M)(i) in light of (M)(ii), the Court should apply the

"rule of lenity" and construe the statute in favor of the immigrant. *Fong Haw Tan*, 333 U.S. at 10.

II.

The Ninth Circuit Erred in Amending Mrs. Kawashima's Judgment in 2010, Where the Government did not Seek Rehearing or Other Review of That Judgment in 2007.

Federal Rule of Appellate Procedure 41(a) states that "unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs." The mandate is ministerial and issues when 7 days has passed after the judgment was entered, if no petition for rehearing or motion for a stay is made. Rule 41(b) further provides that a Court's mandate *must* issue 7 days after the time to file a petition for rehearing expires. Pet. App. H, 144a. The 1994 amendments to Appellate Rule 41 replaced the word "shall" with "must" and the 1998 amendments recasting the rule retained the imperative "must."

After *Kawashima II*, a judgment in favor of Mrs. Kawashima and a copy of the Court's opinion was issued within days of the opinion. The Government petitioned for rehearing of the decision as related to Mr. Kawashima, *but not as related to Mrs. Kawashima*. According to Rule 41, when the Ninth Circuit entered a judgment in 2007 granting Mrs. Kawashima's petition, a mandate should have

automatically issued when 7 days passed and neither a timely petition for rehearing nor a motion to stay the mandate had been filed by the Government. However, the Ninth Circuit has now held that its failure, or the failure of the clerk, to issue a mandate in Mrs. Kawashima's case in 2007 permitted the Court *sua sponte* to amend the judgment in 2010 because, the Ninth Circuit says, the "mandate" had not issued. Pet. App. A, 23a n.7. The Ninth Circuit held that it has jurisdiction to modify the judgment where the Court has not issued its mandate. *Id.* It is the view of the Ninth Circuit, therefore, that if a court does not issue its mandate for 2 years, as in the case at bar, the court can modify the judgment at any time in complete disregard of Rule 41.

The Ninth Circuit's failure, or its clerk's failure, to issue the mandate in accordance with Rule 41, when the government declined to seek review or rehearing, brought finality to the litigation between the parties. The Ninth Circuit's *sua sponte* interference with this result is without support in the Rule or in the rulings of this Court.

As claimed support for its action, the Ninth Circuit relied upon *Finberg v. Sullivan*, 658 F.2d 93, 96 n.5 (3d Cir. 1980) (*en banc*), which in turn cited and relied upon *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977). Pet. App. A, 23a n.7. Apart from the fact that these decisions were rendered before the 1994 and 1998 amendments to Rule 41, in each of these cases, the mandate was stayed after a motion for a stay was made, so the parties could appeal or seek review. Thus, the judgments in *Finberg* and

Alphin were not final pending a decision by this Court and were subject to modification due to a change in the law in the interim. *See also First Gibraltar Bank FSB v. Morales*, 42 F.3d 895, 897-98 (5th Cir. 1995) (mandate stayed preventing the case from becoming final.)

The Government's decision not to file a petition for rehearing in Mrs. Kawashima's case rendered the disposition of her case a finality for *res judicata* and *collateral estoppel* purposes. *See Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 (2009); *see also Salazar v. Buono*, 130 S. Ct. 1803, 1815 (2010) (Kennedy, J., plurality); *id.* at 1843 (Breyer, J., dissenting). As the text writers Wright, Miller & Cooper have stated: "many cases establish the rule that once the time for appeal has run, a final judgment of a trial court or an intermediate appellate court is *res judicata* without regard to the fact that appeal might have been taken to a higher court." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4433 (2d ed. 2002). In an analogous decision of the Court, *United States v. Munsingwear*, 340 U.S. 36 (1950), the United States declined to appeal a judgment and the Court held that the judgment was subject to the doctrine of *res judicata*:

> In this case, the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. ... The case is therefore one where the United States,

> having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it providing terminal points for litigation.

Munsingwear, 340 U.S. at 40; *see also New Haven Inclusion Cases*, 399 U.S. 392, 480-81 (1970).

When the Ninth Circuit issued its opinion in *Kawashima II*, the Government had the option to petition for rehearing in Mrs. Kawashima's case, file a notice of appeal, or move to stay the mandate. The Government did none of these things and the mandate should have issued automatically according to Rule 41.

Rule 41 could not be clearer. The holding of the Court in *Munsingwear* could not be clearer. The Ninth Circuit's opinion is contrary to a holding of this Court and Federal Rule of Appellate Procedure 41, binding on the United States Courts of Appeal, as well as litigants. The Court should review the Ninth Circuit's decision on this issue.

CONCLUSION

The Ninth Circuit decision in this case directly conflicts with the decision of the Third Circuit, which this Court should resolve in the interest of uniformity. The Ninth Circuit, in the face of an ambiguous statute, ignored and dismissed application of this Court's time honored canons of statutory construction and instead chose to speculate

as to the intent of Congress. What is worse, the Ninth Circuit ignored the rule of lenity and bypassed Federal Rule of Appellate Procedure 41(a) to reach a result that imperils the Kawashimas.

The petition for a writ of certiorari should be granted so that the Court can resolve the split between the Ninth and Third Circuits on a legal issue of significant importance requiring national uniformity.

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Respectfully submitted,

Thomas J. Whalen*
Edward J. Longosz, II
Mark A. Johnston
Jeffrey W. Larroca
Eckert Seamans Cherin &
Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
* *Counsel of Record*

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-74313

Akio Kawashima; Fusako Kawashima, Petitioners

v.

Eric H. Holder Jr.,* Attorney General, Respondent

No. 05-74408

Akio Kawashima; Fusako Kawashima, aka Fusako Nakajima

v.

Eric H. Holder Jr.,* Attorney General, Respondent

Argued and Submitted February 8, 2007
Opinion Filed September 18, 2007
Opinion Withdrawn; New Opinion Filed July 1, 2008

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* Eric H. Holder Jr., is substituted for his predecessor Michael B. Mukasey as Attorney General of the United States. Fed R. App. P. 43(c)(2).

Opinion Withdrawn; New Opinion Filed January 27, 2010

Opinion Withdrawn; New Opinion Filed August 4, 2010

Before: DIARMUID F. O'SCANNLAIN, EDWARD LEAVY, and CONSUELO M. CALLAHAN, Circuit Judges.

Order;
Dissent to Order by JUDGE GRABER;
Opinion by JUDGE O'SCANNLAIN

ORDER

The opinion filed in this case on January 27, 2010, and published at 593 F.3d 979, is withdrawn. A new opinion is filed contemporaneously with the filing of this order. The panel has voted unanimously to deny the petition for rehearing. Judges O'Scannlain and Callahan have voted to deny the petition for rehearing en banc, and Judge Leavy has so recommended. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or petitions for rehearing en banc will be entertained.

GRABER, Circuit Judge, with whom WARDLAW and PAEZ, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from denial of rehearing en banc. An aggravated felony is, among other things:

an offense that—

> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000[.]

8 U.S.C. § 1101(a)(43)(M). The panel holds that it is *plain* that the term "loss to the victim or victims" in subsection (i) necessarily encompasses tax revenue loss to the Government even though subsection (ii) specifically governs tax revenue loss to the Government. The panel opinion reaches that conclusion only by contravening clear rules of statutory interpretation.

A. *Statutory Text Must be Read in Context*

Read in isolation, there is little dispute that the term "loss to the victim or victims" is broad enough that it *might* encompass a tax revenue loss to the government. But it is blackletter law that we may not read statutory terms in isolation. *See* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, *the*

specific context in which that language is used, and the broader context of the statute as a whole." (emphasis added)); *Smith v. United States*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute."); *United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the [term in question] must be read in light of the immediately following phrase . . . ." (footnote omitted)); *see also Harbison v. Bell*, 129 S. Ct. 1481, 1492 (2009) (Roberts, C.J., concurring in the judgment) ("We do not construe statutory phrases in isolation; we read statutes as a whole. This certainly applies to reading sentences as a whole." (citation, alterations, and internal quotation marks omitted)).

Often, although a phrase sweeps broadly when read in isolation, surrounding statutory text clarifies that Congress actually intended a narrower meaning. Applications of that simple rule of construction appear throughout the Supreme Court's jurisprudence. For example:

- "The [relevant] term . . . is not defined in the statute, and, out of context, its ordinary meaning could include [the situation at hand]. However, we must not analyze one term of [the statute] in isolation. When [the statute] is read as a whole, the better interpretation is that [the term does not encompass the situation at hand]." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001) (citation omitted).

- "If considered in isolation, the [relevant] phrase . . . could embrace a wide [definition]. After all, in ordinary meaning and usage, [the term has a broad definition]. . . . The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text [and upon other considerations]." Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (citation omitted).

- "[T]he dissent's point that subsection (a) seems clear when read in isolation proves nothing, for 'the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' When subsection (a) is read in context, there is no avoiding the question, 'What could Congress have been getting at with both (a) and (c)?' " Corley v. United States, 129 S. Ct. 1558, 1566 n.5 (2009) (citation and alteration omitted).

The panel's analysis defies that rule of construction by concluding that the meaning of subsection (i) is plain *without regard to the very next clause in the same sentence*. *See* Amended Op. at 11198 (concluding, *before* considering subsection (ii), that: "Thus, according to the plain meaning of the

statutory language," subsection (i) encompasses tax revenue losses to the government). In subsection (i), Congress gave *general* treatment to losses while, in subsection (ii), Congress gave *specific* treatment to tax revenue losses. Without regard to any other analysis, both logic and Supreme Court precedent require us to conclude that the meaning of subsection (i) is *not*
plain and to look to other indicators of congressional intent.[1]

The panel forcefully defends its conclusion that the meaning of subsection (i) is "plain" for the simple reason that each and every other indicator of congressional intent points to the opposite conclusion: Congress intended subsection (ii), and not subsection (i), to cover tax crimes.

B. *Superfluities Must be Avoided if Possible*

The panel's analysis next runs afoul of the rule that, if possible, we must read statutory text to

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[1] Logic and Supreme Court precedent are not the only support for that conclusion. In its opinion published at 593 F.3d 979 (9th Cir. 2010), the panel cited *Balogun v. U.S. Attorney General*, 425 F.3d 1356, 1361 (11th Cir. 2005), to support its conclusion that the meaning of subsection (i) is plain. *Kawashima*, 593 F.3d at 983. The problem is that the court in *Balogun* reached a contrary conclusion. In that case, the Eleventh Circuit addressed the interpretation of subsection (i) in circumstances where the application of subsection (i) was much more straight-forward. Yet, even in those circumstances, the Eleventh Circuit could not conclude that the meaning of subsection (i) is plain. *Balogun*, 425 F.3d at 1361. The panel's response to that fact was to delete its citation to *Balogun*. We can infer that the panel now finds the Eleventh Circuit's reasoning unpersuasive, but we do not know why.

avoid superfluities. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879); *see also Knight v. Comm'r*, 552 U.S. 181, 190 (2008) ("Thus, accepting [a particular] approach would render part of the statute entirely superfluous, something we are loath to do." (internal quotation marks omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

The panel's interpretation renders subsection (ii) superfluous. Subsection (i) encompasses convictions that "involve fraud or deceit" and that involve a loss exceeding $10,000. Subsection (ii) encompasses tax evasion convictions where the tax revenue loss exceeds $10,000. Importantly, because all tax evasion convictions necessarily involve fraud or deceit, *Spies v. United States*, 317 U.S. 492, 499 (1943), subsection (i) necessarily encompasses all convictions encompassed by subsection (ii). The panel's interpretation thus renders subsection (ii) meaningless.

At the same time, it is easy to interpret the statute to give meaning to both subsection (i) and subsection (ii). *Hoffman*, 101 U.S. at 115. It is an entirely reasonable interpretation that Congress intended subsection (ii), and not subsection (i), to

govern tax crimes.[2] Because it is "possible" to give "significance and effect" to all parts of the statutory text, we *must* do so. *Hoffman*, 101 U.S. at 115. "We are not at liberty to construe any statute so as to deny effect to any part of its language." *Id.*

The panel declines to apply this mandatory analysis solely because of its speculation that Congress might have intended to enact a superfluous statutory provision. The panel's reasoning misunderstands the rule against superfluities specifically and the task of statutory interpretation more generally. It is true that no method of statutory interpretation is absolute. Indeed, even when the text is indisputably plain, we sometimes hold that Congress intended something very different (for instance, when the drafters made a typographical mistake). *See, e.g.*, *Herrera v. U.S. Citizenship & Immigration Servs.*, 571 F.3d 881, 886 n.5 (9th Cir. 2009). Here, Congress indeed may have intended to enact a superfluous provision. But there must be some reason to believe that this is the case. We are not at liberty to wave away an indicator of congressional intent simply because it is *conceivable* that Congress intended the opposite. It is always conceivable that Congress did not mean what it said, or intended to enact a superfluous provision, or intended to raise serious questions of

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[2] As the Third Circuit explained, Congress reasonably may have concluded that no tax crimes other than the most severe tax crime—tax evasion—should qualify as an aggravated felony, even if the less severe tax crimes happen to involve fraud or deceit. *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 224 (3d Cir. 2004).

constitutionality, and so on. The panel's observation that, here, that possibility is not beyond the conceivable does not advance the analysis.

On this point, it is extremely important that *all indicators of congressional intent* point in the same direction: Congress intended tax crimes to be governed only by subsection (ii), not subsection (i). The panel points to absolutely nothing that suggests that Congress did not so intend, other than the alleged "plain meaning" of subsection (i) when read alone. Is there any legislative history supporting the panel's view? No. Is there any statutory history supporting the panel's view? No. Is there a statutory purpose that supports the panel's view, such as a rule that the definition should be construed against the alien? No; in fact, the *opposite* presumption applies, as the panel acknowledges. Amended Op. at 11199 n.6; *Kawashima*, 593 F.3d at 984 n.7. Are there other canons of construction that support the panel's view? No; in fact, applicable canons of construction support the *opposite* view, such as the rule that the "specific governs the general." *See Ki Se Lee*, 368 F.3d at 223-24 (explaining the application of this canon of construction). In sum, the panel's unassailable observation that the rule against superfluities is not foolproof gets the panel nowhere; there must be some indicator that, in these particular circumstances, Congress actually intended to enact a superfluous provision. Beyond its speculation, the panel points to none.

In this regard, it is notable that the panel makes a point of reminding the reader no less than four times that it is following then-Judge, now-

Justice, Alito's dissenting view in *Ki Se Lee*. The panel subscribes to, and applies, then-Judge Alito's view that the superfluities rule can be cast aside on the unsupported speculation that Congress may have intended to enact a superfluous provision. Just last year, now-Justice Alito advanced that same general view in *Corley*, 129 S. Ct. 1558. Unable to convince a majority of his colleagues, Justice Alito expressed his views in dissent. *Id.* at 1572-73 (Alito, J., dissenting). The Supreme Court majority, however, roundly rejected this proposed mode of interpretation: "[T]he dissent's point that subsection (a) seems clear when read in isolation proves nothing, for 'the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' When subsection (a) is read in context, there is no avoiding the question, 'What could Congress have been getting at with both (a) and (c)?' " *Id.* at 1566 n.5 (citation and alteration omitted).

Whatever validity the panel's method of interpretation may have had in the past, the Supreme Court clearly rejected it just last year. The panel does not explain how its opinion is consistent with *Corley*.

C. *The Panel's Method of Statutory Interpretation Will Lead to Absurd Results in Other Cases*

Imagine that 8 U.S.C. § 1101(a)(43)(M) defined an "aggravated felony" as "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) involves

fraud or deceit in which the tax revenue loss to the Government exceeds $50,000." Would a conviction resulting in a tax revenue loss to the government of $30,000 qualify as an aggravated felony? Yes, according to the panel's analysis. Or, imagine instead that 8 U.S.C. § 1101(a)(43)(M) defined an "aggravated felony" as "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) involves fraud or deceit in which the tax revenue loss to the Government exceeds $10,000 and the conviction became final after 1999." Would a 1997 conviction resulting in a large tax revenue loss to the government qualify as an aggravated felony? Yes, according to the panel's analysis. Under the panel's analysis, the text of subsection (i) is plain, and we need not be concerned that such an interpretation would render subsection (ii) superfluous, because Congress might have meant to enact a superfluous provision. The panel's opinion provides no basis to distinguish between those hypothetical statutes and the statute as written.

D. *Conclusion*

The panel reads one phrase of the statute in isolation, ignoring the very next phrase in the same sentence. The panel's interpretation of the statutory provision renders another statutory provision superfluous. The panel's interpretation is inconsistent with other canons of construction, including the standard caveat that the specific governs over the general and the rule that an ambiguous statute should be construed in the alien's favor. The panel fails to explain how its method of

interpretation is consistent with recent Supreme Court jurisprudence. When made aware that one of its cited cases actually supports a view contrary to its own, the panel simply deleted its citation of that case without explaining why it found that case unpersuasive. Finally, the panel's opinion will lead to absurd results in other cases. I regret this court's failure to rehear this case en banc.

OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether petitioners' convictions for subscribing to a false statement on a tax return and for aiding and assisting in the preparation of a false tax return qualify as "aggravated felonies" that subject them to removal under the relevant immigration laws.

This is our third published opinion in this case. In our first opinion, *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007), *withdrawn* 503 F.3d 1111 (9th Cir. 2008) ("*Kawashima I*"), we conducted a limited examination of the record of petitioners' convictions to answer such question. One day after our panel opinion was filed, our en banc court decided *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), which caused us to reconsider. We published a second opinion, *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008), *withdrawn* 593 F.3d 979 (9th Cir. 2010) ("*Kawashima II*"), in which we answered the question by applying *Navarro-Lopez* to Kawashima's

conviction in light of our circuit's existing caselaw construing the statute defining "aggravated felony."

After we published our second opinion, the government filed a petition for rehearing en banc. While the government's petition was pending before us, the Supreme Court granted certiorari in *Nijhawan v. Attorney General*, 523 F.3d 387 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 988 (2009). Like the case before us, *Nijhawan* concerned whether a particular conviction for a financial offense constitutes an "aggravated felony" under relevant immigration laws. After the Court issued its opinion, *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), we ordered the parties to file supplemental briefs on *Nijhawan*'s impact on the case before us. In light of this recent guidance from the Court, we issue this hopefully final opinion in this litigation.

I

Akio Kawashima and Fusako Kawashima[1] are natives and citizens of Japan. The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984.

In 1997, Mr. Kawashima pled guilty to subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1). In his plea agreement, he stipulated that the "total actual tax

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[1] We refer to Akio as "Mr. Kawashima" and Fusako as "Mrs. Kawashima." We refer to Akio and Fusako collectively as the "Kawashimas."

loss" for the purpose of determining his offense level under the Sentencing Guidelines was $245,126. Mr. Kawashima further conceded that he could be ordered to pay the same amount in restitution. On the same date, Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). Her plea agreement was not included in the record before us.

On August 3, 2001, the Immigration and Naturalization Service[2] issued separate Notices to Appear to the Kawashimas alleging that the couple was removable because their prior convictions constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i) ("subsection M(i)") (defining as an aggravated felony any offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"). *See id.* § 1227(a)(2)(A)(iii) (stating that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable").[3]

After holding a removal hearing, an Immigration Judge ("IJ") concluded that the Kawashimas' convictions were aggravated felonies

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[2] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an agency under the U.S. Department of Justice and its functions were transferred to the Bureau of Immigration and Customs Enforcement within the newly-formed Department of Homeland Security. We refer to the INS and its successor as the "Service."

[3] The Notice to Appear also alleged that the Kawashimas were removable for having been convicted of aggravated felonies under § 1101(a)(43)(M)(ii), but that allegation is not before us here.

under subsection M(i). Accordingly, the IJ found the Kawashimas removable, denied their motion to terminate the proceedings, and ordered that they be removed to Japan.

The Kawashimas appealed the decision, and the Board of Immigration Appeals ("BIA") remanded because the transcript containing the testimony of the hearing and the IJ's oral decision was defective. After further proceedings, the IJ again denied the Kawashimas' motion to terminate proceedings and ordered them removed to Japan. The BIA affirmed and adopted the IJ's decision.

The Kawashimas subsequently filed a motion to reopen seeking waiver of inadmissibility under the Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). The BIA denied the motion as untimely.

The Kawashimas timely filed separate petitions for review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen. We consolidated the petitions for review pursuant to 8 U.S.C. § 1252(b)(6). We consider each in turn.

II

A

We are faced with the task of determining whether Mr. Kawashima's conviction for willfully making and subscribing to a false statement on a tax return, in violation of § 7206(1), and Mrs.

Kawashima's conviction for aiding and assisting in the preparation of a false tax return, in violation of § 7206(2), constitute aggravated felonies. Section 1101(a)(43)(M) defines an "aggravated felony" to include "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i)-(ii).

As a threshold statutory interpretation matter, we must decide whether tax offenses other than those described in § 7201 qualify as aggravated felonies under subsection (M)(i).[4] In their supplemental brief to this court, the Kawashimas renew their argument, first raised in their opening brief, that subsection (M)(i)'s definition of "aggravated felony" does not include their convictions under § 7206(1) and (2). They reason that subsection (M)(ii)'s specific reference to § 7201 indicates Congress's intent to exclude all federal tax offenses from the definition of aggravated felonies under the more general subsection (M)(i). In our initial opinion in this case, we rejected this argument. *Kawashima v. Gonzales ("Kawashima I")*,

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[4] The Kawashimas' convictions do not constitute aggravated felonies under subsection (M)(ii) because that provision is limited to tax offenses in violation of § 7201. Mr. Kawashima was convicted under § 7206(1) and Mrs. Kawashima was convicted under § 7206(2). *See United States v. Roselli*, 366 F.3d 58, 62 n.5 (1st Cir. 2004).

503 F.3d 997, 999-1001 (9th Cir. 2007). Our ultimate view of this issue remains unchanged.

[1] The plain text of subsection (M)(i) sets forth two requirements for an offense to qualify as an aggravated felony. First, the offense must "involve fraud or deceit." Second, the "loss to the victim or victims" must exceed $10,000. *Ferreira v. Ashcroft*, 390 F.3d 1091, 1096 (9th Cir. 2004). In our view, §§ 7206(1) and (2) necessarily "involve fraud or deceit" because the provisions require the government to prove either that the defendant "willfully" subscribed to a statement in a tax return he did not believe to be true, or that the defendant "willfully" aided and assisted in the making of a false or fraudulent return. Furthermore, given that "the government is a victim in all tax fraud cases," *United States v. Presbitero*, 569 F.3d 691, 707 (7th Cir. 2009), a tax loss in excess of $10,000 satisfies the second prong of subsection (M)(i). Thus, according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which the tax loss to the government exceeds $10,000 constitute aggravated felonies under subsection (M)(i). *Aguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008).

We recognize that a divided panel of the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004).[5] There, the

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[5] We note that since our decision in *Kawashima I*, the Fifth Circuit has explicitly joined us in rejecting the Third Circuit's approach. *Arguelles-Olivares*, 526 F.3d at 174.

court found that the presence of subsection (M)(ii) reflected Congress's intent to specify tax evasion as the only removable tax offense, and thereby exclude tax offenses from the scope of subsection (M)(i). Writing in dissent, however, then-Judge (now Justice) Alito concluded that the plain text of subsection (M)(i) did not preclude the inclusion of tax offenses within its definition of aggravated felonies. *Id.* at 226 (Alito, J., dissenting). We are persuaded by Judge Alito's interpretation of the statute.

The court in *Ki Se Lee* applied two interpretive canons in support of its reading. First, the court applied the canon that prescribes that, whenever possible, a statute should be interpreted to avoid rendering other provisions superfluous. *Id.* at 223. In the court's view, reading subsection (M)(i) to include tax offenses would render subsection (M)(ii) superfluous because any of the tax evasion offenses described by § 7201 would fall within the scope of subsection (M)(i)'s "fraud or deceit" provision. *Id.* at 222-23. Second, the court applied the familiar canon that the "specific governs the general." *Id.* at 223. Noting that subsection (M)(i) is a general provision that covers "fraud and deceit" and subsection (M)(ii) is a narrower provision that only covers federal tax evasion, the court reasoned that this canon also supported its conclusion that tax evasion in violation of § 7201, as described in subsection (M)(ii), is the only removable tax offense. *Id.* at 224.[6]

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[6] The Kawashimas also argue that the canon that construes ambiguities in a deportation statute in favor of the alien supports their argument that subsection (M)(ii) precludes the inclusion of tax offenses in subsection (M)(ii). That canon,

While such canons are often valuable tools in interpreting a statute's text, applying the canons the Third Circuit identified does not lead us to conclude that subsection (M)(i)'s definition of aggravated felonies excludes tax fraud convictions. *See Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting). First and foremost, the Third Circuit's interpretation of subsection (M)(i) fails to account for the text of subsection (M)(i), which categorizes an offense as an aggravated felony as long as it includes two elements, "fraud and deceit" and loss to the victim in excess of $10,000. No further limitations are imposed.

Further, the interpretation adopted by the court in *Ki Se Lee* imputes an intent to Congress that is not supported by the statute's text. As the dissent in *Ki Se Lee* noted, "[i]f Congress had not wanted subsection (M)(i) to apply to 'tax offenses,' Congress surely would have included some language in that provision to signal that intention. As adopted, however, subsection (M)(i) contains no such hint." *Id.*

Finally, there are many reasons why Congress might have included subsection (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i). As the dissent in *Ki Se Lee* emphasized, "[s]ubsection (M)(ii) may have been enacted simply to make certain—

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however, is inapplicable where, as in this case, the statutory language is clear. *See Cardoza-Fonseca v. INS*, 480 U.S. 421, 449 (1987).

even at the risk of redundancy—that tax evasion qualifies as an aggravated felony." *Id.* Although we recognize that the avoidance of surplusage in statutory text is an important goal, Congress harbors other important goals as well when adopting legislation. Judge Alito's dissent suggested two examples. First, even if Congress could not think of a tax evasion offense under § 7201 that would not involve "fraud or deceit" and therefore be adequately covered by subsection (M)(i), Congress has often realized its inability to anticipate every possible type of case, and may have added subsection (M)(ii) just to ensure that no tax evasion case fell outside subsection (M)'s definition of an aggravated felony. *Id.* at 226. Alternatively, Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated felony simply because "fraud" and "deceit" are not specific elements of that offense. *Id.* at 226-27.

[2] We therefore respectfully decline to adopt the Third Circuit's interpretation of subsection (M)(i). We, like Judge Alito and the Fifth Circuit, conclude that tax offenses not covered by subsection (M)(ii)'s specific reference to § 7201 qualify as aggravated felonies under subsection (M)(i) where the loss exceeds $10,000.

B

Our next task is to determine whether the Kawashimas' convictions under §§ 7206(1) and (2) are aggravated felonies within subsection (M)(i)'s definition. In answering this question, we have the benefit of the Supreme Court's recent opinion in

Nijhawan v. Holder, 129 S. Ct. 2294 (2009), which explained the analysis we must follow in answering this question. In *Nijhawan*, the Court considered the applicability of subsection (M)(i) to Manoj Nijhawan, an alien who was convicted for a variety of federal fraud offenses. *Id.* at 2298. None of the statutes under which Nijhawan was convicted required the government to prove the amount of his victims' loss to the jury. At sentencing, however, Nijhawan stipulated that the total loss to his victims exceeded $100 million. *Id.*

[3] Based on these convictions, the government sought to remove Nijhawan from the United States, arguing that his conviction for fraud and his stipulation at sentencing combined to demonstrate that his conviction constituted an aggravated felony under subsection (M)(i). The Court agreed with the government. In so doing, it added a new step to the familiar categorical/modified-categorical approaches first announced in *Taylor v. United States*, 495 U.S. 575 (1990). *Nijhawan*, 129 S. Ct. at 2298. Under this approach, we must first decide whether a requirement under a generic crime is an "element" of the generic crime instead of simply a description of the "particular circumstances" in which the offender committed the crime on a specific occasion. *Id.* at 2298. If the requirement is an "element," we apply the *Taylor* approach; if the requirement is "circumstance specific," we ensure that the BIA used "fundamentally fair procedures" to determine whether the offender's crime satisfies the description of the generic offense. *Id.* at 2302-03.

With these principles of analysis established, we consider Akio and Fusako's cases separately.

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[4] The information, plea agreement, and admission in Mr. Kawashima's case establish that he was convicted of violating § 7206(1). That section has four elements: "(1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) *the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.*" *United States v. Boulware*, 384 F.3d 794, 810 (9th Cir. 2004) (emphasis added). Thus, Mr. Kawashima's conviction under § 7206(1) necessarily involved "fraud or deceit." *See Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting) ("'Fraud' or 'deceit' is a necessary element of 26 U.S.C. § 7206(1) . . . .").

[5] Moreover, the BIA followed fundamentally fair procedures in finding that the offense for which Mr. Kawashima was convicted resulted in a loss to the government of more than $10,000. Specifically, Mr. Kawashima stipulated in the plea agreement that the "total actual tax loss" was $245,126. Given that in *Nijhawan*, the Supreme Court relied on such a stipulation to conclude that a petitioner's prior crime was an "aggravated felony" under subsection

(M)(i), we cannot conclude that the BIA's reliance on such a stipulation in this case was improper.

Based on the evidence available to us in the administrative record, we conclude that clear and convincing evidence supports the BIA's determination that Mr. Kawashima's conviction under § 7206(1) constitutes an aggravated felony as described in subsection (M)(i) because it involved "fraud or deceit" and because his offense resulted in a loss to the government in excess of $10,000. Accordingly, we deny Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's order.

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[6] The record of conviction in Mrs. Kawashima's case establishes that she was convicted of aiding and assisting in the preparation of a false tax return, in violation of § 7206(2).[7] That section requires the government to prove the following: "(1)

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[7] In their supplemental brief to this court, petitioners assert that Mrs. Kawashima's case is no longer before us because after our first opinion in this case granted Mrs. Kawashima's petition for review, the government did not file a petition for rehearing. We are unpersuaded by this argument. Although it is true that the government did not ask us to reconsider our resolution of Mrs. Kawashima's case, we are entitled to do so as we have not yet issued our mandate in this case. As such, our decision remains subject to modification, either at the request of a party or *sua sponte*. *See Finberg v. Sullivan*, 658 F.2d 93, 96 n.5 (3d Cir. 1980) (en banc). Thus, Mrs. Kawashima's case remains before us, and we are obligated to decide the merits of her petitions for review in light of *Nijhawan*.

the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) that *the return was fraudulent or false as to a material matter*; and (3) *the act of the defendant was willful*." *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990) (emphasis added). Moreover, as we observed in *Salerno*, "[t]he Supreme Court has repeatedly held that in order to make out a 'willful violation' of section 7206(2) the government must prove defendants acted with specific intent to defraud the government in the enforcement of its tax laws." *Id.* Thus, a conviction under § 7206(2) necessarily "involves fraud or deceit" and therefore satisfies the first element of an aggravated felony as described in subsection (M)(i).

As to the second element, in *Kawashima I* we concluded that the record of conviction did not contain sufficient evidence to establish that Mrs. Kawashima's offense resulted in a loss to the government in excess of $10,000. 503 F.3d at 1003-04. That conclusion was predicated on our assumption that our analysis should proceed under *Taylor*'s modified categorical approach, and therefore the scope of our review was limited to the types of documents described in *Shepard v. United States*, 544 U.S. 13, 20 (2005), and its progeny.

[7] That assumption, it turns out, was wrong. In *Nijhawan*, the petitioner argued that an immigration court deciding whether an aggravated felony meets subsection (M)(i)'s $10,000 threshold should look only to the "charging documents, jury instructions, and any special jury finding (if one has been requested). If there was a guilty plea (and no

trial) the subsequent court should examine the written plea documents or the plea colloquy." 129 S. Ct. at 2302. The Court rejected this argument, stating that

> nothing in prior law that so limits the immigration court. . . . [T]he cases that developed the evidentiary list to which [Nijhawan] points[ ] developed that list for a very different purpose, namely that of determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction. For another, [Nijhawan's] proposal itself can prove impractical insofar as it requires obtaining from a jury a special verdict on a fact that . . is not an element of the offense.
>
> Further, a deportation proceeding is a civil proceeding in which the Government does not have to prove its claim "beyond a reasonable doubt."

Id. at 2303. Thus, the BIA is not limited to only those documents which a court applying the modified categorical approach may review.

Given this, the government argues that we should remand this case to the BIA so that the agency may determine, in the first instance, what additional types of evidence it may consider under this newly announced standard and so that the government may have the opportunity to introduce evidence to meet this standard. We agree. In *I.N.S.*

v. Ventura, the Supreme Court summarily reversed a Ninth Circuit decision refusing to remand a case to the BIA so that it could determine whether changed country conditions rendered an alien ineligible for asylum. 537 U.S. 13, 15 (2002) (per curiam). The Court held that the Ninth Circuit had erred in deciding the "changed circumstances" matter on its own, observing that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 15-17. Remand is required so that "[t]he agency can bring its expertise to bear on the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17; *see also Gonzales v. Thomas*, 547 U.S. 184 (2006) (per curiam).

Since *Ventura*, we have distinguished between circumstances in which remand is necessary to permit the BIA to apply its expertise in reconsidering evidence and circumstances in which remand is unnecessary because the BIA exercised its expertise before the case came before us. Thus, in *Fernandez-Ruiz v. Gonzales*, we refused to remand a case to the BIA so that it could determine whether the evidence present on an alien's record of conviction established that the conviction was a "crime of domestic violence" rendering him removable. 466 F.3d 1121, 1134-35 (9th Cir. 2006) (en banc). We distinguished *Ventura*, noting that it "undeniably involved an issue the BIA had not considered." *Id.* at 1133. By contrast, in *Fernandez-*

Ruiz, the BIA *had* considered whether the petitioner's state conviction constituted a crime of domestic violence—it had simply conducted this inquiry under the categorical, rather than modified categorical, approach. *Id.* at 1134-35. We did not consider remanding the case for the government to supplement the record of the petitioner's conviction because the government did not ask that we do so. *Id.* at 1135.

[8] This case, however, is ripe for remand. Our remand does not ask the BIA to consider whether evidence currently on the record is sufficient to demonstrate that Mrs. Kawashima's conviction is an "aggravated felony." *Cf. Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1080 (9th Cir. 2007) (holding that we need not remand to the BIA so that it may apply the categorical approach). Instead, we remand to the BIA so that it may determine, in light of the Supreme Court's holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the government as a result of Mrs. Kawashima's crime.

III

Our final task is to determine whether the BIA erred in denying the Kawashimas' motion to reopen.[8]

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[8] The government contends that we lack jurisdiction over the Kawashimas' petition for review of the BIA's decision, citing 8 U.S.C. § 1252(a)(2)(c). That provision strips a court of jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed" certain offenses, including an "aggravated offense." *See* 8 U.S.C. §

A

[9] Mr. Kawashima argues that his motion to the BIA was a special motion pursuant to 8 C.F.R. § 1003.44 to seek § 212(c) relief. Section 1003.44 "applies to certain aliens who formerly were lawful permanent residents, who are subject to an administratively final order of deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and 8 CFR § 1212.3 with respect to convictions obtained by plea agreements reached prior to a verdict at trial prior to April 1, 1997." 8 C.F.R. § 1003.44(a). To obtain relief under this provision, an alien "must file a special motion to seek section 212(c) relief on or before April 26, 2005." *Id.* § 1003.44(h). Furthermore, the provision imposes strict procedural requirements. In particular, the alien's motion "*must* contain the notation '*special motion to seek section 212(c) relief.*' " *Id.* § 1003.44(f) (emphasis added).

1252(a)(2)(c); *see also id.* § 1227(a)(2)(A)(iii). However, the government's argument ignores § 1252(a)(2)(D), which provides that, despite subsection (c), a court remains vested with the jurisdiction to review "constitutional claims or questions of law raised upon a petition for review."

As a threshold matter, the Kawashimas argue that the BIA applied the incorrect regulation when it determined that their motion was untimely. Whether the BIA applied the appropriate regulation is decidedly a "question of law" over which we retain jurisdiction. *See Florez-de Solis v. INS*, 796 F.2d 330, 333 (9th Cir. 1986) ("[Petitioner's] contention that the BIA applied an incorrect standard is a question of law reviewed *de novo*.").

Mr. Kawashima claims that the required notation appears on page nine of the Kawashimas' motion. However, this page fails to contain any of the necessary text. Instead, it simply quotes 8 C.F.R. § 1003.44(b), which states, among other things: "Generally, a special motion under this section to seek section 212(c) relief must establish that the alien . . . ." This language fails in all respects to comply with the strict requirements imposed by 8 C.F.R. § 1003.44(h) and was inadequate to place the BIA and the district counsel on notice that Mr. Kawashima intended to make a special motion to seek § 212(c) relief.

[10] Standing alone, Mr. Kawashima's failure to include the precise language required by § 1003.44(h) is a sufficient basis on which to reject his attempt to construe the Kawashimas' motion as one seeking § 212(c) relief. Even if it were not, however, the cover page and first page of the motion state no less than four times: "Motion to Reopen Proceedings and Stay Deportation Under *Magana-Pizano v. INS*."[9] A motion styled in this manner cannot reasonably be spared by text hidden in a lengthy quote found on page nine of the brief.

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[9] The motion contained no citation to *Magana-Pizano*, but Mr. Kawashima might have been referring to our opinion in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). Although that opinion did discuss § 212(c) and the Antiterrorism and Effective Death Penalty Act in that opinion, it did not concern a motion to reopen. In any event, the motion's reference to *Magana-Pizano* does not comply with the requirements imposed by 8 C.F.R. § 1003.44(f).

[11] Section 1003.44 does not require mere notice, it imposes strict procedural requirements to qualify for relief, including the notation "special motion to seek section 212(c) relief." Accordingly, we conclude that the BIA did not err in applying the 90-day filing deadlines for general motions to reopen pursuant to 8 C.F.R. § 1003.2(c)(2) and in denying Mr. Kawashima's motion to reopen as untimely because it was filed almost eight months late.[10] Therefore, we deny Mr. Kawashima's petition for review of the BIA's denial of the motion to reopen.

B

Since we have granted Mrs. Kawashima's petition for review, we dismiss her petition for review of the BIA's denial of her motion to reopen as moot. *See Goldeshtein v. INS*, 8 F.3d 645, 646 n.1, 650 (9th Cir. 1993) (dismissing as moot petitioner's motion to reopen after concluding that the petitioner is not removable because he was not convicted of a predicate offense involving moral turpitude).

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[10] Pursuant to 8 C.F.R. § 1003.2(c)(2), a general motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." The BIA's final administrative decision upholding the IJ's order of removal was rendered on August 16, 2004. The Kawashimas filed their motion to reopen on April 26, 2005 (or April 27, 2005), more than eight months after the BIA's final decision.

IV

For the foregoing reasons, the petition for review of the BIA's affirmance of the IJ's removal order is **DENIED** with respect to Akio Kawashima (04-74313) and **GRANTED and REMANDED** with respect to Fusako Kawashima (05-74408). The petition to review the BIA's denial of the motion to reopen is **DENIED** with respect to Akio Kawashima (04-74313) and **DISMISSED as MOOT** with respect to Fusako Kawashima (05-74408).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-74313

Akio Kawashima; Fusako Kawashima, Petitioners

v.

Eric H. Holder Jr., Attorney General. Respondent

No. 05-74408

Akio Kawashima; Fusako Kawashima, aka Fusako Nakajima

v.

Eric H. Holder Jr., Attorney General, Respondent

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 8, 2007
Filed January 27, 2010
OPINION

Before: Diarmuid F. O'Scannlain, Edward Leavy,
and
Consuelo M. Callahan, Circuit Judges.
Opinion by Judge O'Scannlain

ORDER

The opinion filed on July 1, 2008, and appearing at 530 F.3d 1111 (9th Cir. 2008) is withdrawn. The superseding opinion will be filed concurrently with this order.

The government's "Petition for Rehearing En Banc" is DENIED as moot.

The parties may file new petitions for rehearing or rehearing en banc as provided by Federal Rule of Appellate Procedure 40.

OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether petitioners' convictions for subscribing to a false statement on a tax return and for aiding and assisting in the preparation of a false tax return qualify as "aggravated felonies" that subject them to removal under the relevant immigration laws.

This is our third published opinion in this case. In our first opinion, *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007), *withdrawn* 503 F.3d 1111 (9th Cir. 2008) ("*Kawashima I*"), we conducted

a limited examination of the record of petitioners' convictions to answer such question. One day after our panel opinion was filed, our en banc court decided *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), which caused us to reconsider. We published a second opinion, *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008), *withdrawn* ___ F.3d ___ (9th Cir. 2010) ("*Kawashima II*"), in which we answered the question by applying *Navarro-Lopez* to Kawashima's conviction in light of our circuit's existing caselaw construing the statute defining "aggravated felony."

After we published our second opinion, the government filed a petition for rehearing en banc. While the government's petition was pending before us, the Supreme Court granted certiorari in *Nijhawan v. Attorney General*, 523 F.3d 387 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 988 (2009). Like the case before us, *Nijhawan* concerned whether a particular conviction for a financial offense constitutes an "aggravated felony" under relevant immigration laws. After the Court issued its opinion, *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), we ordered the parties to file supplemental briefs on *Nijhawan*'s impact on the case before us. In light of this recent guidance from the Court, we issue this hopefully final opinion in this litigation.

I

Akio Kawashima and Fusako Kawashima[1] are natives and citizens of Japan. The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984.

In 1997, Mr. Kawashima pled guilty to subscribing to a false statement on a tax return, in violation of 26 U.S.C.§ 7206(1). In his plea agreement, he stipulated that the "total actual tax loss" for the purpose of determining his offense level under the Sentencing Guidelines was $245,126. Mr. Kawashima further conceded that he could be ordered to pay the same amount in restitution. On the same date, Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). Her plea agreement was not included in the record before us.

On August 3, 2001, the Immigration and Naturalization Service[2] issued separate Notices to Appear to the Kawashimas alleging that the couple was removable because their prior convictions

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[1] We refer to Akio as "Mr. Kawashima" and Fusako as "Mrs. Kawashima." We refer to Akio and Fusako collectively as the "Kawashimas."

[2] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an agency under the U.S. Department of Justice and its functions were transferred to the Bureau of Immigration and Customs Enforcement within the newly-formed Department of Homeland Security. We refer to the INS and its successor as the "Service."

constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i) ("subsection M(i)") (defining as an aggravated felony any offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"). *See id.* § 1227(a)(2)(A)(iii) (stating that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable").[3]

After holding a removal hearing, an Immigration Judge ("IJ") concluded that the Kawashimas' convictions were aggravated felonies under subsection M(i). Accordingly, the IJ found the Kawashimas removable, denied their motion to terminate the proceedings, and ordered that they be removed to Japan.

The Kawashimas appealed the decision, and the Board of Immigration Appeals ("BIA") remanded because the transcript containing the testimony of the hearing and the IJ's oral decision was defective. After further proceedings, the IJ again denied the Kawashimas' motion to terminate proceedings and ordered them removed to Japan. The BIA affirmed and adopted the IJ's decision.

The Kawashimas subsequently filed a motion to reopen seeking waiver of inadmissibility under the Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). The BIA denied the motion as untimely.

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[3] The Notice to Appear also alleged that the Kawashimas were removable for having been convicted of aggravated felonies under § 1101(a)(43)(M)(ii), but that allegation is not before us here.

The Kawashimas timely filed separate petitions for review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen. We consolidated the petitions for review pursuant to 8 U.S.C. § 1252(b)(6). We consider each in turn.

II

A

We are faced with the task of determining whether Mr. Kawashima's conviction for willfully making and subscribing to a false statement on a tax return, in violation of § 7206(1), and Mrs. Kawashima's conviction for aiding and assisting in the preparation of a false tax return, in violation of § 7206(2), constitute aggravated felonies. Section 1101(a)(43)(M) defines an "aggravated felony" to include "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i)-(ii).

As a threshold statutory interpretation matter, we must decide whether tax offenses other than those described in § 7201 qualify as aggravated felonies under subsection (M)(i).[4] In their supplemental brief to this court, the Kawashimas

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[4] The Kawashimas' convictions do not constitute aggravated felonies under subsection (M)(ii) because that provision is limited to tax offenses in violation of § 7201. Mr.

renew their argument, first raised in their opining brief, that subsection (M)(i) is inapplicable in this case. They reason that subsection (M)(ii)'s specific reference to § 7201 indicates Congress's intent to exclude all federal tax offenses from the definition of aggravated felonies under the more general subsection (M)(i). In our initial opinion in this case, we rejected this argument. *Kawashima v. Gonzales* ("*Kawashima I*"), 503 F.3d 997, 999-1001 (9th Cir. 2007). Our ultimate view of this issue remains unchanged.

[1] The plain text of subsection (M)(i) sets forth two requirements for an offense to qualify as an aggravated felony. First, the offense must "involve fraud or deceit." Second, the "loss to the victim or victims" must exceed $10,000. *Ferreira v. Ashcroft*, 390 F.3d 1091, 1096 (9th Cir. 2004). In our view, §§ 7206(1) and (2) necessarily "involve fraud or deceit" because the provisions require the government to prove either that the defendant "willfully" subscribed to a statement in a tax return he did not believe to be true, or that the defendant "willfully" aided and assisted in the making of a false or fraudulent return. Moreover, because the government is a qualifying victim, *see, e.g.*, *Balogun v. U.S. Attorney Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), a tax loss in excess of $10,000 satisfies the second prong of subsection (M)(i). Thus, according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which

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Kawashima was convicted under § 7206(1) and Mrs. Kawashima was convicted under § 7206(2). *See United States v. Roselli*, 366 F.3d 58, 62 n.5 (1st Cir. 2004).

the tax loss to the government exceeds $10,000 constitute aggravated felonies under subsection (M)(i). *Aguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008). And because such interpretation does not lead to an absurd or unreasonable result, our inquiry must end.[5]

We recognize that a divided panel of the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004).[6] There, the court found that the presence of subsection (M)(ii) reflected Congress's intent to specify tax evasion as the only removable tax offense, and thereby exclude tax offenses from the scope of subsection (M)(i). Writing in dissent, however, then-Judge (now Justice) Alito concluded that the plain text of subsection (M)(i) did not preclude the inclusion of tax offenses within its definition of aggravated felonies. *Id.* at 226 (Alito, J., dissenting). We are persuaded by Judge Alito's interpretation of the statute.

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[5] *United States v. King*, 244 F.3d 736, 740 (9th Cir. 2001) ("Unless the plain meaning leads to an absurd or unreasonable result, which it does not here, our 'judicial inquiry is at an end.' " (citation omitted)); *see also United States v. Gonzales*, 520 U.S. 1, 8 (1997) ("Where there is no ambiguity in the words. there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." (internal citation and quotation marks omitted, alteration in original)).

[6] We note that since our decision in *Kawashima I*, the Fifth Circuit has explicitly joined us in rejecting the Third Circuit's approach. *Arguelles-Olivares*, 526 F.3d at 174.

The court in *Ki Se Lee* applied two interpretive canons in support of its reading. First, the court applied the canon that prescribes that, whenever possible, a statute should be interpreted to avoid rendering other provisions superfluous. *Id.* at 223. In the court's view, reading subsection (M)(i) to include tax offenses would render subsection (M)(ii) superfluous because any of the tax evasion offenses described by § 7201 would fall within the scope of subsection (M)(i)'s "fraud or deceit" provision. *Id.* at 222-23. Second, the court applied the familiar canon that the "specific governs the general." *Id.* at 223. Noting that subsection (M)(i) is a general provision that covers "fraud and deceit" and subsection (M)(ii) is a narrower provision that only covers federal tax evasion, the court reasoned that this canon also supported its conclusion that tax evasion in violation of § 7201, as described in subsection (M)(ii), is the only removable tax offense. *Id.* at 224.[7]

While such canons are valuable tools in interpreting a statute's text, it is unnecessary to resort to these devices where, as with subsection (M)(i), the statutory text is clear. *See Ki Se Lee*, 368 F.3d at 226 (Alito J., dissenting); *see also Clark v. Martinez*, 543 U.S. 371, 385 (2005). Subsection (M)(i) plainly categorizes an offense as an aggravated felony as long as it includes two elements, "fraud and

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[7] The Kawashimas also argue that the canon that construes ambiguities in a deportation statute in favor of the alien supports their argument that subsection (M)(ii) precludes the inclusion of tax offenses in subsection (M)(i). That canon, however, is inapplicable where, as in this case, the statutory language is clear. *See Cardoza-Fonseca v. INS*, 480 U.S. 421, 449 (1987).

deceit" and loss to the victim in excess of $10,000. No further limitations are imposed.

Further, the interpretation adopted by the court in *Ki Se Lee* imputes an intent to Congress that is not supported by the statute's text. As the dissent in *Ki Se Lee* noted, "[i]f Congress had not wanted subsection (M)(i) to apply to 'tax offenses,' Congress surely would have included some language in that provision to signal that intention. As adopted, however, subsection (M)(i) contains no such hint." *Id.*

Finally, there are many reasons why Congress might have included subsection (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i). As the dissent in *Ki Se Lee* emphasized, "[s]ubsection (M)(ii) may have been enacted simply to make certain—even at the risk of redundancy—that tax evasion qualifies as an aggravated felony." *Id.* Although we recognize that the avoidance of surplusage in statutory text is an important goal, Congress harbors other important goals as well when adopting legislation. Judge Alito's dissent suggested two examples. First, even if Congress could not think of a tax evasion offense under § 7201 that would not involve "fraud or deceit" and therefore be adequately covered by subsection (M)(i), Congress has often realized its inability to anticipate every possible type of case, and may have added subsection (M)(ii) just to ensure that no tax evasion case fell outside subsection (M)'s definition of an aggravated felony. *Id.* at 226. Alternatively, Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated

felony simply because "fraud" and "deceit" are not specific elements of that offense. *Id.* at 226-27.

[2] We therefore respectfully decline to adopt the Third Circuit's interpretation of subsection (M)(i). As noted above, our view is bolstered by the Fifth Circuit's recent decision to reject *Ki Se Lee* in light of our prior holding in *Kawashima I. Arguelles-Olivares*, 526 F.3d at 174. Accordingly, we reaffirm that tax offenses not covered by subsection (M)(ii)'s specific reference to § 7201 qualify as aggravated felonies under subsection (M)(i) where the loss exceeds $10,000.

B

Our next task is to determine whether the Kawashimas' convictions under §§ 7206(1) and (2) are aggravated felonies within subsection (M)(i)'s definition. In answering this question, we have the benefit of the Supreme Court's recent opinion in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), which explained the analysis we must follow in answering this question. In *Nijhawan*, the Court considered the applicability of subsection (M)(i) to Manoj Nijhawan, an alien who was convicted for a variety of federal fraud offenses. *Id.* at 2298. None of the statutes under which Nijhawan was convicted required the government to prove the amount of his victims' loss to the jury. At sentencing, however, Nijhawan stipulated that the total loss to his victims exceeded $100 million. *Id.*

[3] Based on these convictions, the government sought to remove Nijhawan from the

United States, arguing that his conviction for fraud and his stipulation at sentencing combined to demonstrate that his conviction constituted an aggravated felony under subsection (M)(i). The Court agreed with the government. In so doing, it added a new step to the familiar categorical/modified-categorical approaches first announced in *Taylor v. United States*, 495 U.S. 575 (1990). *Nijhawan*, 129 S. Ct. at 2298. Under this approach, we must first decide whether a requirement under a generic crime is an "element" of the generic crime instead of simply a description of the "particular circumstances" in which the offender committed the crime on a specific occasion. *Id.* at 2298. If the requirement is an "element," we apply the *Taylor* approach; if the requirement is "circumstance specific," we ensure that the BIA used "fundamentally fair procedures" to determine whether the offender's crime satisfies the description of the generic offense. *Id.* at 2302-03.

With these principles of analysis established, we consider Akio and Fusako's cases separately.

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[4] The information, plea agreement, and admission in Mr. Kawashima's case establish that he was convicted of violating § 7206(1). That section has four elements: "(1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or

other document to be true and correct as to every material matter; and (4) *the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.*" *United States v. Boulware*, 384 F.3d 794, 810 (9th Cir. 2004) (emphasis added). Thus, Mr. Kawashima's conviction under § 7206(1) necessarily involved "fraud or deceit." *See Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting) (" 'Fraud' or 'deceit' is a necessary element of 26 U.S.C. § 7206(1) . . . .").

[5] Moreover, the BIA followed fundamentally fair procedures in finding that the offense for which Mr. Kawashima was convicted resulted in a loss to the government of more than $10,000. Specifically, Mr. Kawashima stipulated in the plea agreement that the "total actual tax loss" was $245,126. Given that in *Nijhawan*, the Supreme Court relied on such a stipulation to conclude that a petitioner's prior crime was an "aggravated felony" under subsection (M)(i), we cannot conclude that the BIA's reliance on such a stipulation in this case was improper.

Based on the evidence available to us in the administrative record, we conclude that clear and convincing evidence supports the BIA's determination that Mr. Kawashima's conviction under § 7206(1) constitutes an aggravated felony as described in subsection (M)(i) because it involved "fraud or deceit" and because his offense resulted in a loss to the government in excess of $10,000. Accordingly, we deny Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's order.

[6] The record of conviction in Mrs. Kawashima's case establishes that she was convicted of aiding and assisting in the preparation of a false tax return, in violation of § 7206(2).[8] That section requires the government to prove the following: "(1) the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) that *the return was fraudulent or false as to a material matter*; and (3) *the act of the defendant was willful.*" *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990) (emphasis added). Moreover, as we observed in *Salerno*, "[t]he Supreme Court has repeatedly held that in order to make out a 'willful violation' of section 7206(2) the government must prove defendants acted with specific intent to defraud the government in the enforcement of its tax laws." *Id.* Thus, a conviction under § 7206(2) necessarily "involves fraud or deceit" and therefore

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[8] In their supplemental brief to this court, petitioners assert that Mrs. Kawashima's case is no longer before us because after our first opinion in this case granted Mrs. Kawashima's petition for review, the government did not file a petition for rehearing. We are unpersuaded by this argument. Although it is true that the government did not ask us to reconsider our resolution of Mrs. Kawashima's case, we are entitled to do so as we have not yet issued our mandate in this case. As such, our decision remains subject to modification, either at the request of a party or *sua sponte*. *See Finberg v. Sullivan*, 658 F.2d 93, 96 n.5 (3d Cir. 1980) (en banc). Thus, Mrs. Kawashima's case remains before us, and we are obligated to decide the merits of her petitions for review in light of *Nijhawan*.

satisfies the first element of an aggravated felony as described in subsection (M)(i).

As to the second element, in *Kawashima I* we concluded that the record of conviction did not contain sufficient evidence to establish that Mrs. Kawashima's offense resulted in a loss to the government in excess of $10,000. 503 F.3d at 1003-04. That conclusion was predicated on our assumption that our analysis should proceed under *Taylor*'s modified categorical approach, and therefore the scope of our review was limited to the types of documents described in *Shepard v. United States*, 544 U.S. 13, 20 (2005), and its progeny.

[7] That assumption, it turns out, was wrong. In *Nijhawan*, the petitioner argued that an immigration court deciding whether an aggravated felony meets subsection (M)(i)'s $10,000 threshold should look only to the "charging documents, jury instructions, and any special jury finding (if one has been requested). If there was a guilty plea (and no trial) the subsequent court should examine the written plea documents or the plea colloquy." 129 S. Ct. at 2302. The Court rejected this argument, stating that

> nothing in prior law that so limits the immigration court . . . . [T]he cases that developed the evidentiary list to which [Nijhawan] points[ ] developed that list for a very different purpose, namely that of determining statutory provision that covers several different generic crimes) covered a prior conviction. For another, [Nijhawan's]

> proposal itself can prove impractical insofar as it requires obtaining from a jury a special verdict on a fact that . . . is not an element of the offense.
>
> Further, a deportation proceeding is a civil proceeding in which the Government does not have to prove its claim "beyond a reasonable doubt."

Id. at 2303. Thus, the BIA is not limited to only those documents which a court applying the modified categorical approach may review.

Given this, the government argues that we should remand this case to the BIA so that the agency may determine, in the first instance, what additional types of evidence it may consider under this newly announced standard and so that the government may have the opportunity to introduce evidence to meet this standard. We agree. In *I.N.S. v. Ventura*, the Supreme Court summarily reversed a Ninth Circuit decision refusing to remand a case to the BIA so that it could determine whether changed country conditions rendered an alien ineligible for asylum. 537 U.S. 13, 15 (2002) (per curiam). The Court held that the Ninth Circuit had erred in deciding the "changed circumstances" matter on its own, observing that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 15-17. Remand is required so that "[t]he agency can bring its expertise to bear on the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can,

through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17; *see also Gonzales v. Thomas*, 547 U.S. 184 (2006) (per curiam).

Since *Ventura*, we have distinguished between circumstances in which remand is necessary to permit the BIA to apply its expertise in reconsidering evidence and circumstances in which remand is unnecessary because the BIA exercised its expertise before the case came before us. Thus, in *Fernandez-Ruiz v. Gonzales*, we refused to remand a case to the BIA so that it could determine whether the evidence present on an alien's record of conviction established that the conviction was a "crime of domestic violence" rendering him removable. 466 F.3d 1121, 1134-35 (9th Cir. 2006) (en banc). We distinguished *Ventura*, noting that it "undeniably involved an issue the BIA had not considered." *Id.* at 1133. By contrast, in *Fernandez-Ruiz*, the BIA *had* considered whether the petitioner's state conviction constituted a crime of domestic violence—it had simply conducted this inquiry under the categorical, rather than modified categorical, approach. *Id.* at 1134-35. We did not consider remanding the case for the government to supplement the record of the petitioner's conviction because the government did not ask that we do so. *Id.* at 1135.

[8] This case, however, is ripe for remand. Our remand does not ask the BIA to consider whether evidence currently on the record is sufficient to demonstrate that Mrs. Kawashima's conviction is an

"aggravated felony." *Cf. Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1080 (9th Cir. 2007) (holding that we need not remand to the BIA so that it may apply the categorical approach). Instead, we remand to the BIA so that it may determine, in light of the Supreme Court's holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the government as a result of Mrs. Kawashima's crime.

III

Our final task is to determine whether the BIA erred in denying the Kawashimas' motion to reopen.[9]

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[9] The government contends that we lack jurisdiction over the Kawashimas' petition for review of the BIA's decision, citing 8 U.S.C. § 1252(a)(2)(c). That provision strips a court of jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed" certain offenses, including an "aggravated offense." *See* 8 U.S.C. § 1252(a)(2)(c); *see also id.* § 1227(a)(2)(A)(iii). However, the government's argument ignores § 1252(a)(2)(D), which provides that, despite subsection (c), a court remains vested with the jurisdiction to review "constitutional claims or questions of law raised upon a petition for review."

As a threshold matter, the Kawashimas argue that the BIA applied the incorrect regulation when it determined that their motion was untimely. Whether the BIA applied the appropriate regulation is decidedly a "question of law" over which we retain jurisdiction. *See Florez-de Solis v. INS*, 796 F.2d 330, 333 (9th Cir. 1986) ("[Petitioner's] contention that the BIA applied an incorrect standard is a question of law reviewed *de novo*.").

A

[9] Mr. Kawashima argues that his motion to the BIA was a special motion pursuant to 8 C.F.R. § 1003.44 to seek § 212(c) relief. Section 1003.44 "applies to certain aliens who formerly were lawful permanent residents, who are subject to an administratively final order of deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and 8 CFR § 1212.3 with respect to convictions obtained by plea agreements reached prior to a verdict at trial prior to April 1, 1997." 8 C.F.R. § 1003.44(a). To obtain relief under this provision, an alien "must file a special motion to seek section 212(c) relief on or before April 26, 2005." *Id.* § 1003.44(h). Furthermore, the provision imposes strict procedural requirements. In particular, the alien's motion "*must* contain the notation '*special motion to seek section 212(c) relief.*'" *Id.* § 1003.44(f) (emphasis added).

Mr. Kawashima claims that the required notation appears on page nine of the Kawashimas' motion. However, this page fails to contain any of the necessary text. Instead, it simply quotes 8 C.F.R. § 1003.44(b), which states, among other things: "Generally, a special motion under this section to seek section 212(c) relief must establish that the alien . . . ." This language fails in all respects to comply with the strict requirements imposed by 8 C.F.R. § 1003.44(h) and was inadequate to place the BIA and the district counsel on notice that Mr. Kawashima intended to make a special motion to seek § 212(c) relief.

[10] Standing alone, Mr. Kawashima's failure to include the precise language required by § 1003.44(h) is a sufficient basis on which to reject his attempt to construe the Kawashimas' motion as one seeking § 212(c) relief. Even if it were not, however, the cover page and first page of the motion state no less than four times: "Motion to Reopen Proceedings and Stay Deportation Under *Magana-Pizano v. INS*."[10] A motion styled in this manner cannot reasonably be spared by text hidden in a lengthy quote found on page nine of the brief.

[11] Section 1003.44 does not require mere notice, it imposes strict procedural requirements to qualify for relief, including the notation "special motion to seek section 212(c) relief." Accordingly, we conclude that the BIA did not err in applying the 90-day filing deadlines for general motions to reopen pursuant to 8 C.F.R. § 1003.2(c)(2) and in denying Mr. Kawashima's motion to reopen as untimely because it was filed almost eight months late.[11]

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[10] The motion contained no citation to *Magana-Pizano*, but Mr. Kawashima might have been referring to our opinion in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). Although that opinion did discuss § 212(c) and the Antiterrorism and Effective Death Penalty Act in that opinion, it did not concern a motion to reopen. In any event, the motion's reference to *Magana-Pizano* does not comply with the requirements imposed by 8 C.F.R. § 1003.44(f).

[11] Pursuant to 8 C.F.R. § 1003.2(c)(2), a general motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." The BIA's final administrative decision upholding the IJ's order of removal was

Therefore, we deny Mr. Kawashima's petition for review of the BIA's denial of the motion to reopen.

B

Since we have granted Mrs. Kawashima's petition for review, we dismiss her petition for review of the BIA's denial of her motion to reopen as moot. *See Goldeshtein v. INS*, 8 F.3d 645, 646 n.1, 650 (9th Cir. 1993) (dismissing as moot petitioner's motion to reopen after concluding that the petitioner is not removable because he was not convicted of a predicate offense involving moral turpitude).

IV

For the foregoing reasons, the petition for review of the BIA's affirmance of the IJ's removal order is **DENIED** with respect to Akio Kawashima (04-74313) and **GRANTED and REMANDED** with respect to Fusako Kawashima (05- 74408). The petition to review the BIA's denial of the motion to reopen is **DENIED** with respect to Akio Kawashima (04- 74313) and **DISMISSED as MOOT** with respect to Fusako Kawashima (05-74408).

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rendered on August 16, 2004. The Kawashimas filed their motion to reopen on April 26, 2005 (or April 27, 2005), more than eight months after the BIA's final decision.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-74313

Akio Kawashima; Fusako Kawashima, Petitioners

v.

Michael B. Mukasey, Attorney General, Respondent

No. 05-74408

Akio Kawashima; Fusako Kawashima, aka Fusako Nakajima

v.

Michael B. Mukasey, Attorney General, Respondent

Argued and Submitted February 8, 2007
Filed July 1, 2008

ORDER

Petitioner's "Amended Petition for Rehearing With a Suggestion for an En Banc Hearing" is

GRANTED. The opinion filed on September 18, 2007, and appearing at 503 F.3d 997 (9th Cir. 2007) is withdrawn. The superseding opinion will be filed concurrently with this order. Petitioner's "Motion For Leave to File a Response to the Reply of the United States to the Appellant's Amended Petition for Rehearing" is DENIED as moot. The parties may file new petitions for rehearing or rehearing en banc as provided by Federal Rule of Appellate Procedure 40.

OPINION

PER CURIAM:

We are called upon to decide whether petitioners' convictions for subscribing to a false statement on a tax return and for aiding and assisting in the preparation of a false tax return qualify as "aggravated felonies" that subject them to removal under the relevant immigration laws. In our previous opinion in this case, *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007), *withdrawn* __ F.3d __ (9th Cir. 2008), we conducted a limited examination of the record of petitioners' convictions to answer this question. One day after our panel opinion was filed, our en banc court decided *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), which causes us to reconsider our analysis.

I

Akio Kawashima and Fusako Kawashima[1] are natives and citizens of Japan. The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984.

In 1997, Mr. Kawashima pled guilty to subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1). In his plea agreement, he stipulated that the "total actual tax loss" for the purpose of determining his offense level under the Sentencing Guidelines was $245,126. Mr. Kawashima further conceded that he could be ordered to pay the same amount in restitution. On the same date, Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). Her plea agreement was not included in the record before us.

On August 3, 2001, the Immigration and Naturalization Service[2] issued separate Notices to Appear to the Kawashimas alleging that the couple

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[1] We refer to Akio as "Mr. Kawashima" and Fusako as "Mrs. Kawashima." We refer to Akio and Fusako collectively as the "Kawashimas."

[2] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an agency under the U.S. Department of Justice and its functions were transferred to the Bureau of Immigration and Customs Enforcement within the newly formed Department of Homeland Security. We refer to the INS and its successor as the "Service."

was removable because their prior convictions constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i) ("Subsection M(i)") (defining as an aggravated felony any offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"). *See id.* § 1227(a)(2)(A)(iii) (stating that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable").[3]

After holding a removal hearing, an Immigration Judge ("IJ") concluded that the Kawashimas' convictions were aggravated felonies under Subsection M(i). Accordingly, the IJ found the Kawashimas removable, denied their motion to terminate the proceedings, and ordered that they be removed to Japan.

The Kawashimas appealed the decision, and the Board of Immigration Appeals ("BIA") remanded because the transcript containing the testimony of the hearing and the IJ's oral decision was defective. After further proceedings, the IJ again denied the Kawashimas' motion to terminate proceedings and ordered them removed to Japan. The BIA affirmed and adopted the IJ's decision.

The Kawashimas subsequently filed a motion to reopen seeking waiver of inadmissibility under the Immigration and Nationality Act ("INA") §

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[3] The Notice to Appear also alleged that the Kawashimas were removable for having been convicted of aggravated felonies under § 1101(a)(43)(M)(ii), but that allegation is not before us here.

212(c), 8 U.S.C. § 1182(c) (repealed 1996). The BIA denied the motion as untimely.

The Kawashimas timely filed separate petitions for review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen. We consolidated the petitions for review pursuant to 8 U.S.C. § 1252(b)(6) and consider each in turn.

II

We must first decide whether the Kawashimas' convictions qualify as aggravated felonies under Subsection M(i). To do so, we rely on the familiar two-step test set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007) (acknowledging that the courts of appeals have "uniformly" relied on *Taylor* for this inquiry). First, we "look to the statute under which the [petitioner] was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43). . . . Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the [statute of conviction] falls within the meaning of that term." *Ferreira v. Ashcroft*, 390 F.3d 1091, 1095 (9th Cir. 2004) (internal quotation marks and citation omitted).

If the statute of conviction proscribes a broader range of conduct than the relevant definition of an aggravated felony, we move to the modified

categorical analysis, and conduct a "limited examination of documents in the record of conviction,"[4] asking whether such documents provide "sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive." *Id.* (internal quotation marks and citation omitted).

[1] In this case, Subsection M(i) defines as an aggravated felony any offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). We have held previously that "[t]his particular statutory definition of an aggravated felony . . . has two elements: (1) the offense must involve fraud or deceit, and (2) the offense must also have resulted in a loss to the victim or victims of more than $10,000." *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). Accordingly, the Kawashimas are removable only if they were convicted of both elements. *Id.* at 1189-91; *Li v. Ashcroft*, 389 F.3d 892, 897 (9th Cir. 2004).

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[4] Our examination is limited to a "narrow, specified set of documents" that includes " 'the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.' " *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004) (quoting *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001)). We may not "look beyond the record of conviction itself to the particular facts underlying the conviction." *Id.*

A

[2] We begin with the categorical approach. Mr. Kawashima pled guilty to subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1).[5] Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2).[6] Neither statute requires proof of monetary loss in excess of $10,000. *See Li*, 389 F.3d at 896. Thus, both are "too broad to be a categorical match" for Subsection M(i) and the Kawashimas' prior convictions do not qualify as aggravated felonies under the categorical approach. *See Chang*, 307 F.3d at 1189.

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[5] Specifically, the statute provides fines and imprisonment for any person who

> [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

26 U.S.C. § 7206(1).

[6] That statute provides for the fining and imprisonment of any person who

> [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

26 U.S.C. § 7206(2).

B

We have reached this point in the *Taylor* analysis on four occasions in the past when comparing statutes of conviction lacking a monetary loss element to Subsection M(i) and each time we have turned to the record of conviction to determine whether the jury actually found, or the petitioner (as defendant) necessarily admitted a loss to the victim in excess of $10,000. *See Kharana v. Gonzales*, 487 F.3d 1280, 1284 (9th Cir. 2007); *Ferreira*, 390 F.3d at 1098; *Li*, 389 F.3d at 897; *Chang*, 307 F.3d at 1189-90. Sitting en banc in *Navarro- Lopez*, however, we curtailed our reliance on the record of conviction in circumstances such as these.

[3] In *Navarro-Lopez*, we held that a petitioner's conviction for accessory after the fact under California state law was not categorically a "crime involving moral turpitude" as defined in the INA because the California statute under which petitioner was convicted proscribed a "broader" range of conduct than the generic definition that the INA provides. 503 F.3d at 1071 (interpreting California Penal Code section 32). Specifically, we explained that a "crucial element" of a crime involving moral turpitude is that the offense "involve some level of depravity or baseness," and that the California statute did not include "grave acts of baseness or depravity." *Id.* Then, turning to *Taylor*'s second step, we held that

> The modified categorical approach . . . only applies when the particular elements in the crime of conviction are broader than the

> generic crime. When the crime of conviction is missing an element of the generic crime altogether, we can never find that "a jury was actually required to find all the elements of" the generic crime. *See Li v. Ashcroft*, 389 F.3d 892, 899-901 (9th Cir. 2004) (Kozinski, J., concurring)(providing examples).

Id. at 1073. Because we concluded that the California statute "lack[ed] an element of the generic crime—i.e., the moral turpitude, the requisite depravity," we held that *Taylor* prohibited us from examining the record of petitioner's conviction to determine whether he was, in fact, convicted of such an act. *Id.* As we explained,

> The crime of conviction can never be narrowed to conform to the generic crime because the jury is not required—as *Taylor* mandates—to find all the elements of the generic crime. Even if [petitioner] had admitted to depraved acts, those admissions could not be used to modify the crime because they were not necessary for a conviction.

Id. (footnote and citation omitted).

[4] The statutes under which the Kawashimas were convicted, 8 U.S.C. §§ 7206(1) and (2), did not require the government to prove the amount of loss their actions caused. Thus, if *Navarro-Lopez* applies to this case, we may not turn to the record of the Kawashimas' convictions to determine whether they

actually pled guilty to causing a loss of more than $10,000 as Subsection M(i) requires.

[5] Nevertheless, two factors give us pause before concluding that *Navarro-Lopez* compels such a result here. First, we have previously applied the modified categorical approach in cases where the statute of conviction prohibits a broader range of conduct than the generic offense, regardless of whether the former lacks a particular element of the latter. *See, e.g., United States v. Parker*, 5 F.3d 1322 (9th Cir. 1993) (applying the modified categorical approach to determine whether a jury found the defendant guilty of generic burglary even though the statute under which the defendant was convicted did not require unlawful entry, a necessary element of the generic definition); *United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992) (per curiam) (same). In *Navarro-Lopez*, we did not explicitly overrule these precedents, or the four decisions in which we have applied the modified categorical approach in examining the monetary loss requirement under Subsection M(i). *See Kharana*, 487 F.3d at 1284; *Ferreira*, 390 F.3d at 1098; *Li*, 389 F.3d at 897; *Chang*, 307 F.3d at 1189-90. Nevertheless, *Navarro-Lopez*'s statement that the modified categorical approach never applies when "the crime of conviction is missing an element of the generic crime altogether," 503 F.3d at 1073, is plain and clear. And, because such statement is irreconcilable with our precedents that have held otherwise, we must conclude that they have been impliedly overruled.

In addition, however, we are given pause by the distinction between the handful of aggravated

felonies listed in the INA that require a specific monetary loss and the other generic offenses we construe under *Taylor*. When we apply *Taylor* in the ordinary case, we consider whether a conviction qualifies as a generic offense with a unitary definition, such as a "crime involving moral turpitude" in removal cases or "burglary" in sentencing enhancement cases, to name just two. The *Navarro-Lopez* rule, which requires that the statute of conviction must contain every element of the generic offense before we resort to the modified categorical approach, plainly applies in this setting. *See Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 749 (9th Cir. 2008) (applying *Navarro-Lopez* in a crime involving moral turpitude case); *United States v. Jennings*, 515 F.3d 980, 992-93 (9th Cir. 2008) (applying *Navarro- Lopez* rule in an Armed Career Criminal Act case).

Subsection M(i), however, requires us to undertake a somewhat different inquiry. That statute defines as an aggravated felony any offense that "involves fraud or deceit *in which* loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(i) (emphasis added). Two of our sister circuits have interpreted this "in which" language as a limiting provision or qualifier on the unitary generic offense—crime involving fraud or deceit—rather than an "element" of the offense itself. *See Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 177-79 (5th Cir. 2008).

Under this construction, we suppose, the absence of a monetary loss element from the

Kawashimas' statutes of conviction would not preclude us from examining the record to determine the amount of loss their prior offenses caused. Such an approach would account for the fact that most fraud statutes do not contain a monetary loss element.[7] In addition, it would avoid an anomalous consequence that results from applying *Navarro-Lopez* here. Consider, for example, two of Subsection M(i)'s companion statutes. First, 8 U.S.C. § 1101(a)(43)(M)(ii) defines as an aggravated felony any offense "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." The only offense that can qualify as an aggravated felony under this particular provision of the INA is a violation of § 7201, yet that section contains no specific monetary loss element. Thus, if we decline to examine the record of conviction to determine the loss that occurred, the list of aggravated felonies enumerated in § 1101(a)(43)(M)(ii) is a null set. The very same is true of 8 U.S.C. § 1101(a)(43)(D), which defines as an aggravated felony, among other things, "an[y] offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) . . . if the amount of the funds exceeded $10,000." Section 1956 contains no monetary loss element either and, thus, under *Navarro-Lopez* a violation of that statute can never qualify as a removable offense under this

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[7] *See, e.g.*, 18 U.S.C. § 1344 (bank fraud); *id.* § 152 (concealment of assets, false oaths and claims in bankruptcy); *id.* § 286 (conspiracy to defraud the government with respect to claims); *id.* § 472 (uttering counterfeit obligations or securities); *id.* § 1010 (fraud and false statements in HUD and FHA transactions); *id.* § 1341 (mail fraud).

particular provision of the INA, even though Congress has explicitly defined it as such.[8]

[6] Yet while these considerations might warrant examining the record of conviction to determine whether the Kawashimas' offenses resulted in the monetary loss required by Subsection M(i), we must conclude that *Navarro-Lopez* forecloses that option. We have consistently interpreted Subsection M(i)'s monetary loss requirement as an "element" of the generic offense, which the record of petitioner's conviction must demonstrate that the jury actually found or the petitioner (as defendant) necessarily admitted. *See Kharana*, 487 F.3d at 1283-84; *Li*, 389 F.3d at 897; *Chang*, 307 F.3d at 1189-91. And *Navarro-Lopez*'s prohibition on examining the record of conviction plainly applies to all prior offenses that lack an "element" of the generic offense. 503 F.3d at 1073.

Moreover, we find confirmation for our view in then-Judge Kozinski's concurrence in *Li*, the lone authority cited to in *Navarro-Lopez* as support for this rule. *Navarro-Lopez*, 503 F.3d at 1073 (citing *Li*, 389 F.3d at 899-901 (Kozinski, J., concurring)). The

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[8] The provisions stripped of any practical effect by *Navarro-Lopez* are not limited to those with qualifying language relating to loss suffered by the victim. For example, 8 U.S.C. § 1101(a)(43)(K)(ii) defines as an aggravated felony any offense " described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) *if* committed for commercial advantage." *Id.* (emphasis added). Yet only one of the three enumerated statutes lists the phrase "commercial advantage" as an element. *See* 18 U.S.C. § 2423(d).

question presented in *Li* was identical to the one presented here—whether a petitioner's convictions under fraud-related statutes that lacked monetary loss elements could qualify as aggravated felonies under Subsection M(i). 389 F.3d at 893-94. The majority concluded that such a result was possible if the record of petitioner's conviction demonstrated that the jury "actually found" him to have caused a loss greater than $10,000. *Id.* at 897. Judge Kozinski, on the other hand, wrote separately to state that he would not have examined the record at all because Subsection M(i)'s amount of loss requirement "wasn't an element" of the statutes under which the petitioner had been convicted. *Id.* at 900. Because the en banc court in *Navarro-Lopez* quoted Judge Kozinski's concurrence directly, we cannot reasonably conclude that it did not intend for its rule to control our modified categorical analysis of aggravated felonies defined in Subsection M(i).

[7] Thus, because the statutes to which the Kawashimas pled guilty to violating do not require proof of any particular monetary loss, we do not examine the record of their convictions to determine whether they necessarily pled guilty to causing a loss in excess of $10,000. Our conclusion that the government failed to show that the Kawashimas' convictions are aggravated felonies under the categorical approach means that the Kawashimas are not removable and, accordingly, their petitions for review of the BIA's affirmance of the removal order must be granted.

III

Our final task is to determine whether the BIA erred in denying the Kawashimas' motion to reopen. As we have granted the Kawashimas' petition for review of the removal order, we must dismiss their petition for review of the BIA's denial of their motion to reopen as moot. *See Goldeshtein v. INS*, 8 F.3d 645, 646 n.1, 650 (9th Cir. 1993) (dismissing as moot petitioner's motion to reopen after concluding that the petitioner is not removable because he was not convicted of a predicate offense involving moral turpitude).

IV

For the foregoing reasons, Mr. and Mrs. Kawashima's petition for review of the BIA's affirmance of the IJ's removal order in 04-74313 is **GRANTED** and Mr. and Mrs. Kawashima's petition for review of the BIA's denial of the motion to reopen in 05-74408 is **DISMISSED as MOOT**.

O'SCANNLAIN, Circuit Judge, with whom CALLAHAN, Circuit Judge, joins, specially concurring:

I concur in the court's opinion because it faithfully applies our precedent. I write separately because the anomalous result such precedent requires us to reach ignores the plain meaning of the statute we interpret and disregards common sense.

I

This case puts us to the familiar task of examining the list of removable offenses set forth in the Immigration and Nationality Act ("INA" or the "Act"), 8 U.S.C. § 1101, *et seq.*, to determine whether an alien's prior conviction fits within the scope of one such offense and, as a consequence, subjects him or her to deportation. In this case, the question presented is whether Mr. and Mrs. Kawashima, who pled guilty to having committed fraud in relation to the filing of their tax returns, have been convicted of a crime "involv[ing] fraud or deceit in which loss to the victim or victim exceeds $10,000," as defined by 8 U.S.C. § 1101(a)(43)(M)(i) ("Subsection M(i)"). Our holding that the Kawashimas' convictions do not qualify as removable offenses is compelled by two of our precedents.

First, when this court considers whether a petitioner's prior conviction qualifies as a removable offense under the INA, we apply the two-step test designed by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), for recidivist sentencing enhancement statutes structured in the same way.

See, e.g., Ye v. INS, 214 F.3d 1128, 1131-34 (9th Cir. 2000). At the first step, we ask whether the petitioner's prior conviction necessarily involves every element of the removable offense (the "generic offense"). If it does, the fact of the defendant's conviction alone qualifies him or her as removable. *Id.* at 1133. If the statute under which the petitioner was convicted proscribes a broader range of conduct than the generic offense, however, we move to *Taylor*'s second step (which our court calls the "modified categorical approach"), and examine the record of conviction to determine whether the jury in petitioner's criminal trial "was actually required to find' " or the petitioner (as defendant) necessarily admitted " 'all the elements of the generic crime.' "[1] *Li v. Ashcroft*, 389 F.3d 892, 896 (9th Cir. 2004) (quoting *Taylor*, 495 U.S. at 602).

The second precedent that compels our holding is our recent en banc decision in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), where we reformulated our modified categorical approach and held that "[w]hen the [petitioner's] crime of conviction is missing an element of the generic crime altogether," we can never examine the record of conviction to determine whether the former fits within the scope of the latter because the record can never reveal whether the jury was actually required to find, or the petitioner (as

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[1] In *Shepard v. United States*, 544 U.S. 13 (2005), the Supreme Court held that *Taylor* applies in equal force when determining whether a defendant's prior conviction qualifies as a generic offense that subjects him or her to a sentencing enhancement regardless of whether the conviction arose from a jury verdict or a guilty plea. *Id.* at 20-21.

defendant) necessarily admitted, any element of the generic offense that is not included in the statute of conviction. *Id.* at 1073. Our holding, of course, was informed by the lone authority we cited for this rule—then-Judge Kozinski's concurrence in *Li*. 389 F.3d at 899-901. There, Chief Judge Kozinski noted that, in sentencing cases, *Taylor* made clear that the jury convicting a defendant of a predicate offense must be " '*actually required*' " to find him or her guilty of every element of the sentencing enhancement statute's generic offense before the sentencing judge can increase the defendant's sentence based on such prior crime. *Id.* at 899 (quoting *Taylor*, 495 U.S. at 602 (emphasis in *Li*)).

Chief Judge Kozinski identified our decisions in *United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992) (per curiam), and *United States v. Parker*, 5 F.3d 1322 (9th Cir. 1993), as violating this rule and argued that they should be reversed. *Li*, 389 F.3d at 899-900 (Kozinski, J., concurring). In *Alvarez*, we concluded that a defendant's California conviction for burglary qualified as generic burglary as defined in a federal sentencing enhancement statute, even though generic burglary requires "unlawful entry," an element the California statute lacked. 972 F.2d at 1005. We determined that such result was justified because the charging papers alleged that the defendant committed an unlawful entry even though the statute under which he was convicted was silent on the point. *Id.* We applied the same reasoning in *Parker*, although we determined that the record was insufficient. 5 F.3d at 1327. In *Li*, Chief Judge Kozinski argued that we ignored *Taylor* in both cases because "even if the jury had found that [the

defendant] entered a building unlawfully, finding a fact isn't the same as being required to find it—and *Taylor* calls for the latter." *Li*, 389 F.3d at 900 (Kozinski, J., concurring) (internal citations omitted).

Our court adopted this reasoning in *Navarro-Lopez*, explicitly citing Chief Judge Kozinski's *Li* concurrence, and such reasoning certainly appears consistent with *Taylor*'s core principles. Yet, it compels a most curious result here. In the case at hand, the Kawashimas pled guilty to violating a federal statute that prohibits fraud but does not require a particular monetary loss. Maj. Op. at 7908. Under *Navarro-Lopez*, we cannot consult the record of their convictions to determine whether their crimes caused a loss exceeding $10,000, as Subsection M(i) requires, because such loss is not an element of the statute they pled guilty to violating. *See* Maj. Op. at 7915. Of course, this means that virtually no crime will subject an alien to removal under Subsection M(i) because there are almost no statutes that punish fraud and also specify that the fraud must cause a loss of $10,000 or more. *See* Maj. Op. at 7914-15 & n.7 (collecting examples). And, as the court explains, *Navarro-Lopez* renders several of the INA's other removability provisions completely unenforceable because no statute contains all the "elements" they require. *See id.* at 7914-15. I doubt seriously that Congress would have bothered to list and to define crimes in the INA that subject their perpetrators to removal if it did not believe that any criminals would actually be removed once convicted of committing them.

II

Before *Navarro-Lopez*, our caselaw avoided the illogical result that decision compels in this particular case. Previously, we considered whether fraud convictions qualified as removable offenses under Subsection M(i) by examining the record of conviction to determine the loss amount even where the statute of conviction lacked such an element. *See Kharana v. Gonzales*, 487 F.3d 1280, 1283-84 (9th Cir. 2007); *Li*, 389 F.3d at 897; *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002). We interpreted Subsection M(i) as having two "elements": (1) fraud or deceit, and (2) loss to the victims in excess of $10,000. *Chang*, 307 F.3d at 1189. And, to remain consistent with *Taylor*, we insisted that the record of conviction establish that the jury "actually found" or that the petitioner necessarily pled guilty to both. *Li*, 389 F.3d at 896 n.7, 897-98. In other words, we treated Subsection M(i)'s loss requirement as an "element" of the generic offense, but accepted record evidence as sufficient to establish that the petitioner was, in fact, convicted of such element. *See Kharana*, 487 F.3d at 1281 n.2 (statute of conviction did not require monetary loss, but "in entering her plea, petitioner admitted to defrauding her victims of over $77,000"); *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098-99 (9th Cir. 2004) (statute of conviction required only a $1,000 loss, but restitution amount set forth in plea agreement was sufficient to establish that petitioner's crime involved a $10,000 loss).

Navarro-Lopez rejected this approach, concluding that even our demand for such overwhelming evidence violated *Taylor*'s

requirement that the crime of conviction contain every element of the generic offense. *See* 503 F.3d at 1073. This may very well be the best reading of *Taylor*, but if so, it is curious that none of our sister circuits agree with the rule *Navarro-Lopez* requires us to apply here.[2] Thus, in my view, the flaw in *Navarro-Lopez* lies not in its interpretation of *Taylor*, but in its unbending application of that test, designed for criminal sentencing enhancement statutes, in the distinct setting of civil removal.

III

A

Our precedents applying the modified categorical approach in immigration cases make two assumptions that I suggest are untenable. The first assumption is that any and all language Congress

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[2] The Second Circuit toyed with adopting the rule we did in *Navarro-Lopez*, but ultimately presumed, without deciding, that our pre-*Navarro-Lopez* approach controls. *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 127, 131 (2d Cir. 2007). The Eleventh Circuit also appears to take the route we chose before *Navarro-Lopez*. *See Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785, 789 (11th Cir. 2007); *see also Graham v. Mukasey*, 519 F.3d 546, 550-51 (6th Cir. 2008) (not endorsing a particular approach but examining the record of conviction to determine that a petitioner's prior conviction qualified as an aggravated felony under Subsection M(i) even though the statute of conviction did not require a $10,000 loss). But, as further explained below, the First, Third, Fifth, and Seventh Circuits have not only rejected our *Navarro-Lopez* approach but further conclude that even our pre-*Navarro-Lopez* cases frustrate the plain meaning of the INA.

uses to define a particular generic offense in the INA must be parsed into "elements," each of which the petitioner must, in fact, have been convicted. Four of our sister circuits reject such extreme literalism, and with good reason. The most common generic offenses found in the INA and in recidivist sentencing enhancement statutes are "relatively unitary categorical concepts— like 'forgery' . . . 'burglary' . . . or 'crime of violence.' " *Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004) (emphasis added). It makes sense to insist that a defendant was actually convicted of a burglary or forgery or committing violence before a subsequent tribunal enhances his sentence upon a future conviction or classifies him as a removable alien on the basis of this prior offense. Yet as the Third and Fifth Circuits explain, "a departure from the formal categorical approach seems warranted" in cases where the generic offense "invite[s] inquiry into the facts underlying the conviction at issue." *Id.*; *see Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 176-77 (5th Cir. 2008) (same). Indeed, "[t]he qualifier 'in which the loss to the victim or victims exceeds $10,000" in [Subsection M(i)] is the prototypical example—it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue." *Singh*, 383 F.3d at 161. Simply stated, Subsection M(i) classifies an alien as removable if he or she is convicted of a fraud-related offense "*in which* the loss to the victim or victims exceeds $10,000," it does not require conviction of "a $10,000 fraud." *See Nijhawan v. Attorney Gen.*, 523 F.3d 387, 393 (3d Cir. 2008) (emphasis added). As the Third Circuit illustrates, just as we would not interpret a generic offense that subjects an alien to removal if he or she is convicted

"within the last two years" to require such durational language to be included in the statute of conviction itself, it is unreasonable to read Subsection M(i) as requiring the statute of conviction expressly to provide for a $10,000 loss. *See Singh*, 383 F.3d at 161; *see also Arguelles-Olivares*, 526 F.3d at 177-78 ("The amount of loss is relevant in a criminal prosecution primarily, if not exclusively, to sentencing. When a tribunal subsequently examines. for collateral purposes like those here, the amount of loss resulting from an offense, the reason for applying the modified categorical approach does not fully obtain.").

Accordingly, I believe it is unreasonable to interpret Subsection M(i) to require a "loss to the victim" element in the alien's statute of conviction. Rather, the most natural reading of Subsection M(i)'s $10,000 loss requirement is as a qualifying provision that limits the number of predicate convictions that would otherwise subject an alien to removal. In other words, the statute provides that any alien who commits an offense "involv[ing] fraud or deceit" is removable *if* such offense is one "in which" the loss to the victim exceeded $10,000. 8 U.S.C. § 1101(a)(43)(M)(i). As the Third and Fifth Circuits suggest, the text of this statute plainly directs the agency (and our court upon a petition for review) to examine the circumstances surrounding the alien's conviction; it does not demand that the statute of conviction specify the amount of monetary loss itself.

B

More importantly, acknowledging the linguistic distinction between provisions such as Subsection M(i) and the remainder of the removable offenses enumerated in the INA should not obscure the greater mischief *Navarro-Lopez* creates. As noted in the court's opinion, the courts of appeals have uniformly begun with *Taylor*'s categorical approach when comparing predicate crimes to generic offenses in the INA. Maj. Op. at 7909-10 (citing *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007)). Yet to accept that *Taylor* informs such task is not to suggest that *Taylor* controls it. In *Navarro-Lopez*, we continued to assume, as we always have, that the test the Supreme Court designed in *Taylor* for the purpose of categorizing prior convictions under recidivist sentencing enhancement statutes must apply, root-and-branch, to the task of categorizing prior convictions under the INA. Our colleagues on the First and Seventh Circuits, however, have recognized that although the legal question is similar, two critical distinctions between sentencing and removal make it imperative to adapt *Taylor* to fit the confines of this separate arena. *See Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006).

First, the Supreme Court's decision in *Taylor* was informed by constitutional concerns that are entirely absent from the immigration context. When a sentencing judge increases a defendant's sentence based on his or her prior convictions, the defendant's Sixth Amendment rights are impacted directly. Yet when an immigration judge cites an alien's prior

conviction as the basis for removal, there is no constitutional right in play. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (explaining that "various protections that apply in the context of a criminal trial do not apply in a deportation proceeding"); *Conteh*, 461 F.3d at 55. As the Seventh Circuit explains, *Taylor* was designed to "prevent[ ] the sentencing judge in the new case from assuming a role that the Constitution assigns to the jurors in the first case." *Ali*, 521 F.3d at 741. This design served two purposes: saving the sentencing court the burden of a retrial, *see Taylor*, 495 U.S. at 601-02, and preserving the Sixth Amendment's allocation of responsibilities between the judge and jury, *see id.*; *Shepard*, 544 U.S. 24-26. The latter concern has no place in an immigration case because it is not a criminal proceeding and, as such, "the [S]ixth [A]*mendment* and the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), do not come into play." *Ali*, 521 F.3d at 741. And the former goal, saving the agency the burden of a retrial, is a question within the agency's discretion rather than our own. *Id.*; *see also Conteh*, 461 F.3d at 45; *Nijhawan*, 523 F.3d at 399 ("[W]e should not raise an aspect of an immigration statute to the level of an element of a criminal offense . . . merely because requiring that it be a part of the conviction eases a court's decision-making process.")

Second, the INA specifies that, in removal proceedings, the government "has the burden of establishing by clear and convincing evidence" that

the alien is removable. 8 U.S.C. § 1229a(c)(3)(A).[3] *Navarro-Lopez*, and indeed even our pre-*Navarro-Lopez* cases, require far more. Before *Navarro-Lopez*, we demanded that the record of conviction prove that the jury actually found or that the alien necessarily admitted to every so-called "element" of the generic offense listed in the INA. But in so doing, we raised the burden of proof in removal proceedings beyond the INA's "clear and convincing" standard to the burden *Taylor* imposes in sentencing cases, which is materially indistinguishable from proof beyond a reasonable doubt. *Nijhawan*, 523 F.3d at 398; *Conteh*, 461 F.3d at 56. In *Navarro-Lopez*, our refusal even to examine the record of conviction for such evidence in cases where the statute of conviction is missing any language from the INA's definition of the generic offense is stricter still. The Act provides unequivocal instructions to the contrary. In the absence of any constitutional reason to require otherwise, I believe our disregard for those instructions obstructs Congress's intent and exceeds our judicial role.

As the Seventh Circuit has explained, after the fact of petitioner's prior conviction has been established, "the appropriate classification of that conviction"—whether it was a crime 'involving moral turpitude' or one 'in which loss . . . exceeds

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[3] The statute goes on to provide that "No decision of deportability shall be valid unless it is based on reasonable, substantial, and probative evidence." 8 U.S.C. § 1229a(c)(3)(A). The Act also lists the sources of evidence which may be consulted to establish proof of a conviction. *Id.* § 1229a(c)(3)(B). Those sources are substantially similar to those described as within the bounds of the inquiry in *Taylor* and *Shepard*.

$10,000'—may require additional information." *Ali*, 521 F.3d at 741. That is to say, the need to decide whether a crime is one of "moral turpitude" or one in which the loss to the victim exceeds a particular amount "does not have a parallel in criminal cases." *Id.* at 741-42. After all, a term such as " 'moral turpitude' just isn't relevant to the criminal prosecution; it is not as if 'turpitude' were an element of an offense." *Id.*; *see also Navarro-Lopez*, 503 F.3d at 1085 (Bea, J., dissenting) ("There is no generic federal crime of moral turpitude . . . . One has to have a *crime*, such as burglary, to use the *Taylor* categorical analysis.").

It is true that the INA requires an alien to be "convicted" of the generic offenses before he or she may be considered removable on that basis. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1227(a)(2)(A)(i) (requiring the same for aliens "convicted" of crimes involving moral turpitude). But applying the INA's evidentiary burden as it is written is not inconsistent with this requirement. The INA does not require that the jury in petitioner's case was actually required to find him or her guilty of every word or phrase it uses to describe a generic offense. *See Conteh*, 461 F.3d at 56. Instead, the Act requires clear and convincing evidence (1) that the petitioner was, in fact, convicted, and (2) that the conviction fits the appropriate classification—a crime "involving moral turpitude" or one "in which" the loss exceeds a particular amount, for example. This is a heavy burden and will not easily be met in cases such as this one, where the text of the statute of

conviction and the generic offense are not a categorical match. But, there may be clear and convincing evidence that a petitioner's conviction fits within the scope of the relevant generic offense even where the formal elements of the statute of conviction are missing language from the generic offense. Criminal statutes simply do not contain as "elements" all the language used in the INA to describe removable offenses. Congress understood this when it enacted the INA and did not require that a petitioner literally be convicted of as much for his or her conviction to trigger removal.

If one accepts that *Taylor*'s constitutional concerns do not migrate to the removal context, and if one further accepts that the burden of proof set forth in the INA differs from *Taylor*'s, there is no reason to ignore the record of conviction when determining whether an alien's conviction qualifies as a removable offense. It should make no difference if the question is whether the predicate conviction was one "involving moral turpitude," as it was in *Navarro-Lopez*, or if the question is whether such conviction is one "in which loss . . . exceeds $10,000," as it is here.[4] In my view, *Navarro-Lopez*'s refusal to

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[4] If one accepts such proposition, a separate question arises as to what sources a court may consider in determining whether clear and convincing evidence that a predicate offense fits within the relevant generic offense in the INA. The First Circuit limits its inquiry to the materials listed in 8 U.S.C. § 1229a(c)(3)(B), which are essentially the same as those described in *Taylor* and *Shepard*. *See Conteh*, 461 F.3d at 55. The Seventh Circuit, on the other hand, interprets the INA to limit the inquiry to the materials listed in § 1229a(c)(3)(B) only for purposes of ascertaining the fact of petitioner's conviction.

examine the record of conviction in either setting whenever the statute of conviction is missing these so-called "elements" is simply unsupportable.

Navarro-Lopez may have accurately interpreted *Taylor*, but it did so at the expense of fairly applying the INA. By importing *Taylor*'s criminal sentencing test, root-and-branch, to the arena of civil removal in which we find ourselves here, I believe *Navarro-Lopez* improperly rewrites the INA's plain instructions and stands as a roadblock needlessly frustrating Congress's intent.

IV

Our reformulation of the modified categorical approach in *Navarro-Lopez* stands alone, without support from any other courts of appeals to have considered this question. Moreover, our treatment of this issue was, at best, cursory—two paragraphs and a footnote—and, in my view, entirely insufficient to address a question of such great magnitude. Our decision never addressed the dissenting views of our sister circuits, or even acknowledged the precedents it overturned. *See Hart v. Massanari*, 266 F.3d 1155,

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For the question of whether the conviction fits the appropriate classification (e.g., the amount of the victim's loss, or whether the crime is one of moral turpitude), "additional evidence may be taken by the immigration judge when necessary," *Ali*, 521 F.3d at 742 (citing *In re Babaisakov*, 24 I. & N. Dec. 306 (2007)), even "evidence beyond the charging papers and judgment of conviction," *id.* at 743.

1171 (9th Cir. 2001) (Kozinski, J.) ("[W]e would consider it bad form to ignore contrary authority by failing even to acknowledge its existence . . . . So long as the [rejected] earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.").

In light of such swift treatment of an important and frequently recurring question, and especially in light of the growing weight of authority that rejects our conclusion, I believe it is fair to ask whether the modified categorical analysis we adopted as law of this circuit in *Navarro-Lopez* reasonably interprets the INA. I believe it does not, and I write separately in the hope that an en banc court with the power to address the anomalies that *Navarro-Lopez* compels will ask the same question very soon.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-74313

Akio Kawashima; Fusako Kawashima, Petitioners

v.

Alberto R. Gonzales, Attorney General, Respondent

No. 05-74408

Akio Kawashima; Fusako Kawashima, aka Fusako Nakajima

v.

Alberto R. Gonzales, Attorney General, Respondent

Argued and Submitted February 8, 2007
Filed September 18, 2007

OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to determine whether aliens' convictions for subscribing to a false statement on a tax return and for aiding and assisting in the preparation of a false tax return qualify as "aggravated felonies" under the relevant immigration laws, and therefore constitute removable offenses.

I

Akio Kawashima and Fusako Kawashima[1] are natives and citizens of Japan. The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984. In a Notice to Appear dated August 3, 2001, the Service[2] alleged that Mr. Kawashima was subject to removal based on his 1997 conviction for subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1). Another Notice of Removal, also dated August 3, 2001, alleged that Mrs. Kawashima was subject to removal based on her 1997 conviction for aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). Both Notices alleged that the loss to the victim, the revenue loss to the

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[1] We refer to Akio as Mr. Kawashima and Fusako as Mrs. Kawashima. We refer to Akio and Fusako collectively as the "Kawashimas."

[2] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an agency under the U.S. Department of Justice and its functions were transferred to the Bureau of Immigration and Customs Enforcement within the newly-formed Department of Homeland Security. We refer to the INS and its successor as the "Service."

government, exceeded $10,000, and that the Kawashimas were subject to removal because their convictions qualified as "aggravated felony" offenses, as defined in 8 U.S.C. § 1101(a)(43)(M)(i)-(ii) ("subsection (M)").

After holding a removal hearing, the IJ concluded that the Kawashimas' convictions were aggravated felonies. Accordingly, the IJ found the Kawashimas removable, denied their motion to terminate the proceedings, and ordered that they be removed to Japan.

The Kawashimas appealed the IJ's decision, and the BIA remanded because the transcript containing the testimony of the hearing and the IJ's oral decision was defective. After further proceedings, the IJ again denied the Kawashimas' motion to terminate the proceedings and once again ordered the Kawashimas removed to Japan. The BIA affirmed without a separate opinion. The Kawashimas subsequently filed a motion to reopen to seek waiver of inadmissibility under the Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). The BIA denied the motion as untimely. The Kawashimas timely filed separate petitions for review of the BIA's affirmance of the IJ's removal order and the BIA's denial of the motion to reopen. We consolidated the petitions for review pursuant to 8 U.S.C. § 1252(b)(6).

II

We are faced with the task of determining whether Mr. Kawashima's conviction for willfully

making and subscribing to a false statement on a tax return, in violation of § 7206(1), and Mrs. Kawashima's conviction for aiding and assisting in the preparation of a false tax return, in violation of § 7206(2), constitute aggravated felonies. Section 1101(a)(43)(M) defines an "aggravated felony" to include "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. § 1101(a)(43) (M)(i)-(ii).

A

As a threshold statutory interpretation matter, we must decide whether tax offenses other than those described in § 7206(1) qualify as aggravated felonies under subsection (M)(i).[3]The Kawashimas argue that subsection (M)(i) is inapplicable in this case, reasoning that subsection (M)(ii)'s specific reference to § 7201 indicates Congress's intent to exclude all federal tax offenses from the definition of aggravated felonies under the more general subsection (M)(i). We are not persuaded.

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[3] The Kawashimas' convictions do not constitute aggravated felonies under subsection (M)(ii) because that provision is limited to tax offenses in violation of § 7201. Mr. Kawashima was convicted under § 7206(1) and Mrs. Kawashima was convicted under § 7206(2). *See United States v. Roselli, 366 F.3d 58, 62 n.5 (1st Cir. 2004).*

[1] The plain text of subsection (M)(i) sets forth two requirements for an offense to qualify as an aggravated felony. First, the offense must "involve fraud or deceit." Second, the "loss to the victim or victims" must exceed $10,000. *Ferreira v. Ashcroft*, 390 F.3d 1091, 1096 (9th Cir. 2004). In our view, §§ 7206(1) and (2) necessarily "involve fraud or deceit" because the provisions require the government to prove either that the defendant "willfully" subscribed to a statement in a tax return he did not believe to be true, or that the defendant "willfully" aided and assisted in the making of a false or fraudulent return. *See infra*, Part II.C. Moreover, because the government is a qualifying victim, *see, e.g., Balogun v. U.S. Attorney Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), a tax loss in excess of $10,000 satisfies the second prong of subsection (M)(i). Thus, according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which the tax loss to the government exceeds $10,000 constitute aggravated felonies under subsection (M)(i). And because such interpretation does not lead to an absurd or unreasonable result, our inquiry must end.[4]

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[4] *United States v. King*, 244 F.3d 736, 740 (9th Cir. 2001) ("Unless the plain meaning leads to an absurd or unreasonable result, which it does not here, our 'judicial inquiry is at an end.' " (citation omitted)); *see also United States v. Gonzales*, 520 U.S. 1, 8 (1997) ("Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." (internal citation and quotation marks omitted)).

[2] We recognize that a divided panel of the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004), a case cited by neither party. There, the court found that the presence of subsection (M)(ii) reflected Congress's intent to specify tax evasion as the only removable tax offense, and thereby exclude tax offenses from the scope of subsection (M)(i). Writing in dissent, however, then-Judge (now Justice) Alito concluded that the plain text of subsection (M)(i) did not preclude the inclusion of tax offenses within its definition of aggravated felonies. *Id.* at 226 (Alito, J., dissenting). We are persuaded by Judge Alito's interpretation of the statute.

The court in *Ki Se Lee* applied two interpretive canons in support of its reading. First, the court applied the canon that prescribes that, whenever possible, a statute should be interpreted to avoid rendering other provisions superfluous. *Id.* at 223. In the court's view, reading subsection (M)(i) to include tax offenses would render subsection (M)(ii) superfluous because any of the tax evasion offenses described by § 7201 would fall within the scope of subsection (M)(i)'s "fraud or deceit" provision. *Id.* at 222-23. Second, the court applied the familiar canon that the "specific governs the general." *Id.* at 223. Noting that subsection (M)(i) is a general provision that covers "fraud and deceit" and subsection (M)(ii) is a narrower provision that only covers federal tax evasion, the court reasoned that this canon also supported its conclusion that tax evasion in violation

of § 7201, as described in subsection (M)(ii), is the only removable tax offense. *Id.* at 224.[5]

[3] While such canons are valuable tools in interpreting a statute's text, it is unnecessary to resort to these devices where, as with subsection (M)(i), the statutory text is clear. *See Ki Se Lee*, 368 F.3d at 226 (Alito J., dissenting); *see also Clark v. Martinez*, 543 U.S. 371, 385 (2005). Subsection (M)(i) plainly categorizes an offense as an aggravated felony as long as it includes two elements, "fraud and deceit" and loss to the victim in excess of $10,000. No further limitations are imposed.

Further, the interpretation adopted by the court in *Ki Se Lee* imputes an intent to Congress that is not supported by the statute's text. As the dissent in *Ki Se Lee* noted, "[i]f Congress had not wanted subsection (M)(i) to apply to 'tax offenses,' Congress surely would have included some language in that provision to signal that intention. As adopted, however, subsection (M)(i) contains no such hint." *Id.*

Finally, there are many reasons why Congress might have included subsection (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i). As the

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[5] The Kawashimas also argue that the canon that construes ambiguities in a deportation statute in favor of the alien supports their argument that subsection (M)(ii) precludes the inclusion of tax offenses in subsection (M)(ii). That canon, however, is inapplicable where, as in this case, the statutory language is clear. *See Cardoza-Fonseca v. INS*, 480 U.S. 421, 449 (1987).

dissent in *Ki Se Lee* emphasized, "[s]ubsection (M)(ii) may have been enacted simply to make certain—even at the risk of redundancy—that tax evasion qualifies as an aggravated felony." *Id.* Although we recognize that the avoidance of surplusage in statutory text is an important goal, Congress harbors other important goals as well when adopting legislation. Judge Alito's dissent suggested two examples. First, even if Congress could not think of a tax evasion offense under § 7201 that would not involve "fraud or deceit" and therefore be adequately covered by subsection (M)(i), Congress has often realized its inability to anticipate every possible type of case, and may have added subsection (M)(ii) just to ensure that no tax evasion case fell outside subsection (M)'s definition of an aggravated felony. *Id.* at 226. Alternatively, Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated felony simply because "fraud" and "deceit" are not specific elements of that offense. *Id.* at 226-27.

[4] We therefore respectfully decline to adopt the Third Circuit's interpretation of subsection (M)(i). Accordingly, we conclude that tax offenses not covered by subsection (M)(ii)'s specific reference to § 7201 qualify as aggravated felonies under subsection (M)(i) where the loss exceeds $10,000.

B

Our next task is to determine whether the Kawashimas' convictions under §§ 7206(1) and (2) meet subsection (M)(i)'s definition. To do so, we rely on the familiar two-step test set forth in *Taylor v.*

United States, 495 U.S. 575 (1990). *See, e.g.*, *Ferreira*, 390 F.3d at 1095. First, we "look to the statute under which the person was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43). . . . Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the [statute of conviction] falls within the meaning of that term." *Id.* (citations and internal quotation marks omitted).

If the statute of conviction is broader than the definition of the relevant removal offense, we must then proceed to the "modified" categorical approach. *Id.* Under the modified categorical approach, we conduct a "limited examination of documents in the 'record of conviction.' " *Id.* (quoting *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir.2002)). Upon this examination, we ask "whether there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive." *Id.*

The record of conviction that forms the boundaries of our investigation is limited to a "narrow, specified set of documents that includes 'the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment.' " *Id.* We may not "look beyond the record of conviction itself to the particular facts underlying the conviction." *Id.* If the record of conviction fails to establish that the petitioner's offense qualifies as an aggravated felony, the government has failed to

meet its burden of proving that the defendant committed an aggravated felony. *Id.*

[5] The conduct proscribed by §§ 7206(1) and (2), the statutes under which the Kawashimas were convicted, is broader than the conduct that meets the definition of an aggravated felony under subsection (M)(i). Simply stated, the statutes under which the Kawashimas were convicted do not require proof of monetary loss in excess of $10,000. *See Li v. Ashcroft*, 389 F.3d 892, 896 (9th Cir. 2004). Accordingly, we must turn to the modified categorical approach in this case.

1

[6] The information, plea agreement, and admission in Mr. Kawashima's case establish that he was convicted of violating 7206(1). That section has four elements: "(1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) *the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.*" *United States v. Boulware*, 384 F.3d 794, 810 (9th Cir. 2004) (emphasis added). Thus, Mr. Kawashima's conviction under § 7206(1) necessarily involved "fraud or deceit." *See Ki Se Lee*, 368

F.3d at 226 (Alito, J., dissenting) (" 'Fraud' or 'deceit' is a necessary element of 26 U.S.C. § 7206(1) . . . ."). Moreover, the record of conviction establishes that the offense for which Mr. Kawashima was convicted resulted in a loss to the government of more than $10,000. Specifically, Mr. Kawashima stipulated in the plea agreement that the "total actual tax loss" was $245,126.

[7] Based on the evidence available to us in the record of conviction, we conclude that Mr. Kawashima's conviction under § 7206(1) constitutes an aggravated felony as described in subsection (M)(i) because it involved "fraud or deceit" and because his offense resulted in a loss to the government in excess of $10,000. Accordingly, we deny Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's order.

2

[8] The record of conviction in Mrs. Kawashima's case establishes that she was convicted of aiding and assisting in the preparation of a false tax return, in violation of § 7206(2). That section requires the government to prove the following: "(1) the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) that *the return was fraudulent or false as to a material matter*; and (3) *the act of the defendant was willful.*" *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990) (emphasis added). Moreover, as we observed in *Salerno*, "[t]he Supreme Court has repeatedly held that in order to make out a 'willful violation' of section 7206(2) the government must

prove defendants acted with specific intent to defraud the government in the enforcement of its tax laws." *Id.* Thus, a conviction under § 7206(2) necessarily "involves fraud or deceit" and therefore satisfies the first element of an aggravated felony as described in subsection (M)(i). As to the second element, however, the modified categorical approach limits the scope of our review to the record of conviction to determine whether Mrs. Kawashima's offense resulted in a loss to the government in excess of $10,000. Mrs. Kawashima expressly denied that such loss occurred. The government produced an information charging Mrs. Kawashima with violating § 7206(2) and alleging that she willfully aided and assisted in her husband's filing of a false corporate tax return. The information alleges that the tax return "did not include substantial income, namely, $76,645 that the corporation received in 1991." Failure to report income, however, does not represent the "tax loss" to the government. Thus, the information alone fails to demonstrate that Mrs. Kawashima's offense resulted in a tax loss to the government in excess of $10,000.

[9] The government failed to produce any other documents eligible for our consideration under the modified categorical approach. The record of conviction lacks any plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, or the judgment. Nor may this court rely on the loss stipulated in Mr. Kawashima's plea agreement for the purpose of establishing the amount of loss caused by his wife's offense. Accordingly, there is no evidence available to us that establishes that Mrs. Kawashima's conviction

resulted in a tax loss to the government in excess of $10,000.

The government argues that "it cannot reasonably be claimed" that the tax loss did not exceed $10,000. In support of this argument, the government directs our attention to the Sentencing Guidelines, specifically U.S.S.G. § 2T1.1(c) (1)(A). That section provides as follows: "If the offense involving filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made." *Id.* The government's reliance on § 2T1.1(c)(1)(A) is misplaced, however, because the Sentencing Guidelines are irrelevant to the modified categorical approach *Taylor* and its progeny require us to follow in this case. When determining whether an offense qualifies as an aggravated felony, our investigation is strictly limited to only the charging document, a signed plea agreement, jury instructions, guilty pleas, tran- scripts of a plea proceeding and the judgment. Nothing more may be considered.

[10] On the record now before us, under the modified categorical approach, we cannot conclude that Mrs. Kawashima committed an offense involving "fraud or deceit" that resulted in loss to the government in excess of $10,000, as required by subsection (M)(i).[6] The record of conviction in Mrs.

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[6] The government argues that Mrs. Kawashima waived her argument that her offense did not result in a loss to the

Kawashima's case consisted only of the information and her admission of the conviction. Neither document establishes that the tax loss to the government resulting from her offense exceeded $10,000. The government failed to carry its burden.

[11] The government contends that we must remand to afford it another opportunity to compile a record of conviction. Under similar circumstances in *Notash v. Gonzales*, 427 F.3d 693 (9th Cir. 2005), the government failed to introduce into the record documents that the court could have examined under the modified categorical approach. *Id.* at 699. Without remanding the case to allow the government to introduce new evidence or allow the agency to apply the modified categorical approach, we concluded that the government failed to meet its burden of proving that the petitioner was convictedof the predicate offense and therefore granted the petition for review. *Id.* Here, as in *Notash*, our precedents clearly establish the limited number of documents a court may consider under the modified categorical approach. In such a case, the government should not have a second bite at the apple.[7]

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government in excess of $10,000 because she did not dispute the matter in her briefing to this court. We disagree. The Kawashimas adequately raised the argument in their opening briefing, arguing that the tax offenses did not constitute aggravated felonies because they did not involve "fraud or deceit *in which the loss to the victim exceeds $10,000.*" (emphasis added).

[7] The government's reliance on *INS v. Ventura*, 537 U.S. 12, 16-18 (2002), in support of remand is misplaced. The Court in *Ventura* considered an issue on which the BIA had not yet had an opportunity to rule. In this case, however, the issue

Accordingly, we grant Mrs. Kawashima's petition for review of the BIA's affirmance of the IJ's order and we vacate her order of removal.

III

Our final task is to determine whether the BIA erred indenying the Kawashimas' motion to reopen.[8]

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of whether Mrs. Kawashima's conviction was an aggravated felony was already decided by the BIA. *See also Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1133-34 (9th Cir. 2006) ("*Ventura* undeniably involved an issue the BIA had not considered . . . [B]y contrast, whether the offense underlying [the defendant's] 2003 conviction was a crime of domestic violence under federal law is an issue the BIA has already addressed . . . .").

[8] The government contends that we lack jurisdiction over the Kawashimas' petition for review of the BIA's decision, citing 8 U.S.C. § 1252(a)(2)(c). That provision strips a court of jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed" certain offenses, including an "aggravated offense." *See* 8 U.S.C. § 1252(a)(2)(c); *see also id.* § 1227(a)(2)(A)(iii). However, the government's argument ignores § 1252(a)(2)(D), which provides that, despite subsection (c), a court remains vested with the jurisdiction to review "constitutional claims or questions of law raised upon a petition for review."

As a threshold matter, the Kawashimas argue that the BIA applied the incorrect regulation when it determined that their motion was untimely. Whether the BIA applied the appropriate regulation is decidedly a "question of law" over which we retain jurisdiction. *See Florez-de Solis v. INS*, 796 F.2d 330, 333 (9th Cir. 1986) ("[Petitioner's] contention that the BIA applied an incorrect standard is a question of law reviewed *de novo*.").

A

[12] Mr. Kawashima argues that his motion to the BIA was a special motion pursuant to 8 C.F.R. § 1003.44 to seek section 212(c) relief. Section 1003.44 "applies to certain aliens who formerly were lawful permanent residents, who are subject to an administratively final order of deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and 8 CFR 1212.3 with respect to convictions obtained by plea agreements reached prior to a verdict at trial prior to April 1, 1997." 8 C.F.R. § 1003.44(a). To obtain relief under this provision, an alien "must file a special motion to seek section 212(c) relief on or before April 26, 2005." *Id.* § 1003.44(h). Furthermore, the provision imposes strict procedural requirements. In particular, the alien's motion "*must* contain the notation '*special motion to seek section 212(c) relief.*' " *Id.* § 1003.44(f) (emphasis added).

[13] Mr. Kawashima claims that the required notation appears on page nine of the Kawashimas' motion. However, this page fails to contain any of the necessary text. Instead, it simply quotes 8 C.F.R. § 1003.44(b), which states, among other things: "Generally, a special motion under this section to seek section 212(c) relief must establish that the alien . . . ." This language fails in all respects to comply with the strict requirements imposed by 8 C.F.R. § 1003.44(h) and was inadequate to place the BIA and the district counsel on notice that Mr. Kawashima intended to make a special motion to seek section 212(c) relief.

Standing alone, Mr. Kawashima's failure to include the precise language required by § 1003.44(h) is a sufficient basis on which to reject his attempt to construe the Kawashimas' motion as one seeking section 212(c) relief. Even if it were not, however, the cover page and first page of the motion state no less than four times: "Motion to Reopen Proceedings and Stay Deportation Under *Magana-Pizano v. INS*."[9] A motion styled in this manner cannot reasonably be spared by text hidden in a lengthy quote found on page nine of the brief.

[14] Section 1003.44 does not require mere notice, it imposes strict procedural requirements to qualify for relief, including the notation "special motion to seek section 212(c) relief." Accordingly, we conclude that the BIA did not err in applying the 90-day filing deadlines for general motions to reopen pursuant to 8 C.F.R. § 1003.2(c)(2) and in denying Mr. Kawashima's motion to reopen as untimely because it was filed almost eight months late.[10]

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[9] The motion contained no citation to *Magana-Pizano*, but Mr. Kawashima might have been referring to our opinion in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). Although that opinion did discuss § 212(c) and the Antiterrorism and Effective Death Penalty Act in that opinion, it did not concern a motion to reopen. In any event, the motion's reference to *Magana-Pizano* does not comply with the requirements imposed by 8 C.F.R. § 1003.44(f).

[10] Pursuant to 8 C.F.R. § 1003.2(c)(2), a general motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." The BIA's final administrative decision upholding the IJ's order of removal was rendered on

Therefore, we deny Mr. Kawashima's petition for review of the BIA's denial of the motion to reopen.

B

Since we have granted Mrs. Kawashima's petition for review, we dismiss her petition for review of the BIA's denial of her motion to reopen as moot. *See Goldeshtein v. INS*, 8 F.3d 645, 646 n.1, 650 (9th Cir. 1993) (dismissing as moot petitioner's motion to reopen after concluding that the petitioner is not removable because he was not convicted of a predicate offense involving moral turpitude).

IV

For the foregoing reasons, the petition for review of the BIA's affirmance of the IJ's removal order is **DENIED** with respect to Akio Kawashima (04-74313) and **GRANTED** with respect to Fusako Kawashima (05-74408). The petition to review the BIA's denial of the motion to reopen is **DENIED** with respect to Akio Kawashima (04-74313) and **DISMISSED as MOOT** with respect to Fusako Kawashima (05-74408).

August 16, 2004. The Kawashimas filed their motion to reopen either on April 26, 2005 (or April 27, 2005), more than eight months after the BIA's final decision.

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File Nos. A 38-554-590
A 38-554-5991

In the Matters of:

Akio Kawashima
Fusako Kawashima

Respondents

Decided June 24, 2003

DECISION AND ORDER OF THE
IMMIGRATION JUDGE

BEFORE INGRID K. HRYCENKO:

I. Procedural History

Respondents, Akio Kawashima and Fusako Kawashima, are natives of Japan. Respondents were admitted to the United States at Los Angeles, California on or about June 21, 1984 as an immigrant. On November 24, 1997, Respondents

were convicted in the United States District Court, Central District of California for the offense of Subscribing to False Statement on a Tax Return, a felony in violation of Title 26, Section 7206(1) of the United States Code. Accordingly the Service[1] initiated removal proceedings against Respondent by filing a Notice to Appear ("NTA") with the court on August 25, 2000. In the NTA, the Service allege that Respondent's conviction for the offense of Subscribing to a False Statement on a Tax Return is an aggravated felony because the offense resulted in the loss to the victim that exceeded $10,000. Therefore, the Service charged Respondents with removability pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), for having been convicted of an aggravated felony as defined in section 101(a)(43)(M)(i) and (ii) of the INA.

Following the filing of the NTA, Respondents appeared before the Court on September 14, 2000, and through counsel, admitted factual allegations # 1 – 4 contained in the NTSs, but denied factual allegations # 5 and # 6. Respondents also denied the removability. Respondent then designated Japan as

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[1] On March 1, 2003, the Immigration and Naturalization Service Ceased to exist as an agency under the U.S. Department of Justice and became part of the newly-formed Department of Homeland Security. For the present time, however, the Court will continue to refer to the Immigration and Naturalization Service as "the Service" in exclusion , deportation, and removal proceedings initiated prior to March 2003. In addition, the Court will continue to cite Chapter I of title 8 of the Code of Federal Regulations for Authority in accordance with 69 FR 9824 (Feb. 28, 2003).

the country of removal should such action become necessary. However, Respondents did not request any forms of relief except Voluntary Departure. Respondents then moved to have the proceedings terminated based on the assertion that their conviction did not amount to an aggravated felony, thereby rendering the charges of removability inapplicable to them. In support of this contention, Respondents filed a Motion to Terminate with the Court on January 16, 2001. The Court, however, concluded that the Respondents' conviction was an aggravated felony, and therefore sustained the charges of removability. As such, the Immigration Judge rendered an oral decision on February 14, 2001 denying Respondent's Motion to Terminate. Moreover, the Court ordered Respondents removed to Japan as they were not eligible for voluntary departure because of their aggravated felony conviction.

Consequently, on March 13, 2001, Respondents filed an appeal with the Board of Immigration Appeals ("the Board"). However, the Board was unable to decide the appeal because the tape in the record of proceeding did not contain the Immigration Judge's oral decision denying Respondents' Motion to Terminate. Accordingly, on January 28, 2003, the Board remanded the case back to the Court and ordered the Court to "take such steps as are necessary and appropriate to enable preparation of a complete transcript of the proceeding and decision. See Board's Order, dated January 28, 2003.

The case was, therefore, re-calendar for a hearing on March 11, 2003. At the March 11, 2003 hearing, Respondents' counsel, again, moved to terminate proceedings based on the assertion that Respondents' conviction is not deemed to be an aggravated felony as defined by section 101(a)(43)(M)(i) and 101(a)(43)(M)(i)(ii). Respondents' counsel submitted a Points and Authorities Memorandum in support of the Respondent's Motion to Terminate. On April 30, 2003, the Service filed its opposition to Respondents' Motion to Terminate.

II. Discussion

In their Points and Authorities submitted in support of their assertion that they are not removable as charged, Respondents argue that the charges of removability was incorrectly lodged against them. First, Respondent asserts that their conviction for the offense of Subscribing to False Statement on Tax Return is not deemed to be a felony because they were only imposed a sentence of imprisonment for four months. Furthermore, Respondents assert that whether an offense is deemed to an aggravated felony for the purposes of immigration proceedings is determined by the actual term of imprisonment imposed. In support of their assertion , Respondents cites to U.S. v Graham, 169 F.3d 787 (3rd Cir. 1999). The Court, however, notes that the precedents of any other Circuit Court of Appeals , besides the Ninth Circuit, are not binding on this Court. Moreover, Respondent's contention is incorrect. Both the Immigration and Nationality Act

and the Ninth Circuit Court of Appeals have expressly determined that fraud or deceit in which the loss to victim exceeds the $10,000 is considered to be an aggravated felony . See INA §101(a)(43)(M)(i); Abreu-Reyes v INS, 292 F.3d 1029(9th Cir. 2002).

Based on the Respondents' conviction record and plea agreement, the Court finds that Respondent has conceded to "willfully signing a tax return that was false as to a material matter," and which resulted in the loss to the government of over $200,000. See Exhibit 2. As such, the Court concludes that Respondents' conviction for the offense of Subscribing to False Statement on a Tax Return is deemed to be an aggravated felony as defined by INA §101(a)(43)(M)(i). Therefore, The Court finds that the charge of removability pursuant to INA § 237(a)(2)(A)(iii) is sustainable.

Additionally, the Court notes that even if the Service cannot sustain the second removability charge,[2] because Respondents were convicted for tax fraud under section 7206 (1) of the Internal Revenue Code instead of tax evasion in violation of section 7201, the Court would still deny the Motion to Terminate because the other charge of removability can be and has been sustained. As Respondents have admitted to and been convicted of the offense of tax fraud which resulted in the loss to the government of over $10,000, Respondents are deemed to have

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[2] INA § 237(a)(2)(A)(iii) for conviction of an aggravated felony based on an offense (tax evasion) in violation of 7201 of the Internal Revenue Code.

convicted an aggravated felony and therefore found removable as charged Therefore, the Court will deny Respondents' Motion to Terminate.

Accordingly, the following order shall enter:

ORDER

IT IS HEREBY ORDERED that Respondents' Motion to Terminate is Denied.

Dated 6/24/03

/s/ Ingrid K. Hrycenko,

United States Immigration Judge

APPENDIX F

IMMIGRATION COURT
606 SOUTH OLIVE STREET, 15th FLOOR
LOS ANGELES, CA 90014

Case No. A38-554-590

In the Matter of

Akio Kawashima

Filed February 14, 2001

ORDER OF THE IMMIGRATION JUDGE IN REMOVAL PROCEEDINGS

This is the summary of the oral decision entered on February 14, 2001. This memorandum is solely for the convenience of the parties. If the proceeding should be appealed or reopened, the oral decision will become the official decision in the case.

The respondent was ordered removed from the United Sates to Japan.

* * * *

Date: February 14, 2001

Appeal due by March 14, 2001

/s/ Ingrid K. Hrycenko
Immigration Judge

APPENDIX G

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

File: A38-554-590 – Los Angeles

Date: August 16, 2004

In re: Kawashima, Akio

In Removal Proceedings Appeal

ORDER:

PER CURIUM. The Board affirms, without opinion, the results of the decision below. The decisions below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

/s/ Illegible
FOR THE BOARD

APPENDIX H

1. 8 U.S.C. § 1101(a)(43) holds that:

(43) The term "aggravated felony" means –

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as definedin section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in - (i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses); (ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or (iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political

offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that - (i) relates to the owning, controlling, managing, or supervising of a prostitution business; (ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or (iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in - (i) section 793 (relating to gathering or transmitting national

defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18; (ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or (iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that - (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12

months. except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph. The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment

was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 26 U.S.C. §§ 7206(1) - (2) Hold that:

Any person who—

(1) Declaration under penalties of perjury - Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance - Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or...

3. Fed. R. App. P. 41(a)- (c) Hold that:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents.

Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued.

The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date.

The mandate is effective when issued.

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

United States of America,
Plaintiff

v

Akio Kawashima,
Defendant

NO. CR 97-746-RMT

GOVERNMENT'S FILING OF A PLEA AGREEMENT

Plaintiff United States of America, through its counsel, United States Attorney STEVE A. LINICK, hereby files the plea agreement in above-entitled matter.

Dated: August 11, 1997.

NORA M. MANELLA
United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

/s/ Steve A. Linick
STEVE A. LINICK
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

PLEA AGREEMENT

United States v. Akio Kawashima

I

INTRODUCTORY PARAGRAPH

1. This constitutes the plea agreement between Akio Kawashima ("Mr. Kawashima") and the United States Attorney's Office for the Central District of California ("this office") related to the investigation of Akio Kawashima for violations of the Internal Revenue Code (Title 26, United States Code).

II

PLEA

2. Mr. Kawashima agrees to waive indictment by a grand jury and plead guilty to the count in an information charging him with subscribing to a false U.S. Corporation Income Tax Return for the taxable year ending October 31, 1991, in violation of 26 U.S.C. § 7206(1).

III

NATURE OF THE OFFENSE

3. In order for Mr. Kawashima to be guilty of violating 26 U.S.C. § 7206(1), the government must prove the following elements beyond a reasonable doubt: (i) Mr. Kawashima signed a tax return that was false as to a material matter; (ii) the return signed by Mr. Kawashima contained a written declaration that it was signed under the penalty of perjury; (iii) Mr. Kawashima did not believe the return to be true and correct as to a material matter; and (iv) Mr. Kawashima acted willfully. By signing this agreement, Mr. Kawashima admits that he is, in fact, guilty of this offense.

IV

PENALTIES

4. The statutory maximum sentence that the Court can impose for a conviction of 26 U.S.C. § 7206(1) is three years incarceration, a one year period of supervised release, a fine of $100,000, along with the costs of prosecution, and a special assessment of $50.00. Mr. Kawashima recognizes that he may be deported as a result of his conviction.

5. In addition, Mr. Kawashima understands that the court can order him to pay restitution of $245,126.00. Mr. Kawashima agrees that the restitution order is not restricted to the amounts alleged in the count to which he is pleading guilty. Mr. Kawashima further agrees that any restitution

imposed by the court may not be discharged, in whole or in part, in any present or future bankruptcy proceeding. The United States agrees that any amount that Mr. Kawashima pays in restitution shall be applied against any civil tax liability of Nihon Seibutsu Kagaku Center, Inc. ("NSC") and/or Cho Cho San, Inc.

6. If Mr. Kawashima is placed on supervised release following imprisonment and he violates one or more of the conditions of supervised release, he may be returned to prison for all or part of the term of supervised release, which could result in his serving a total of imprisonment greater than the statutory maximum stated above. The Court can also order Mr. Kawashima to pay the costs of his imprisonment. Mr. Kawashima agrees to pay his special assessment at or before the time of sentencing.

V.

FACTUAL BASIS

7. Mr. Kawashima and this office agree and stipulate to the statement if the facts below:

During the taxable years ended October 31, 1985 through October 31, 1991, Mr. Kawashima operated Cho Cho San, a Japanese Restaurant located at 19010 Ventura Boulevard, Tarzana, California ("the Tarzana Restaurant") . The Tarzana Restaurant, which began doing business in 1983, operated under the corporate name of NSC, a California corporation incorporated on November 3,

1981. During the taxable years ended October 31, 1985 through October 31, 1991, Mr. Kawashima owned a portion of the shares of NSC.

During the taxable years ended December 31, 1988 through December 31, 1991, Mr. Kawashima and his wife, Fusako Kawashima (collectively referred to as the "Kawashimas") operated Cho Cho San, a Japanese restaurant located at 400 East Thousand Oaks Boulevard, Thousand Oaks, California ("the Thousand Oaks Restaurant"). The Thousand Oaks Restaurant, which began operating in or about September, 1988, is owned by Cho Cho San, Inc., a California corporation incorporated on January 20, 1987. During the taxable years ended December 31, 1988 through December 31, 1991, the Kawashimas ownership interest in Cho Cho San, Inc., in the aggregate, totaled 50%, with Mr. Kawashima owning a 30% interest and Fusako Kawashima owning a 20% interest.

On or about January 14, 1992, Mr. Kawashima signed and thereafter caused to filed with the United States Internal Revenue Service ("IRS") a U.S. Corporation Income Tax Return (Form 1120) on behalf of NSC for the taxable year ended October 31, 1991. This tax return contained a written declaration that it was being signed under penalty of perjury. Mr. Kawashima knew that the return was materially false in that it failed to report all the taxable income that NSC earned during the taxable year ended October 31, 1991. Mr. Kawashima acted willfully in underreporting income on this return.

VI

SENTENCING FACTORS

8. The parties agree and stipulate that the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") in effect as of November 1, 1991 will govern in determining Mr. Kawashima's guideline range.

9. The parties agree and stipulate that except for a two-level reduction in the applicable sentencing guideline offense level pursuant to section 3E1.1 of the Sentencing Guidelines, no other adjustments under Chapters 2 or 3 of the Sentencing guidelines to increase/enhance or decrease the applicable sentencing guideline offense level apply.

10. The parties agree and stipulate that the applicable guideline is section 2T1.3 of the Sentencing Guidelines, under which the base offense is determined from the tax table set forth in section 2T4.1 of the Sentencing Guidelines.

* * * *

12. The parties further agree and stipulate that "the tax loss" for the purpose of determining Mr. Kawashima's offense level is a percentage of the corporations' corrected unreported taxable income, as determined by the corporate tax schedule for the applicable year, for a total actual tax loss of $245,126. The tax loss calculation takes into account the federal income tax deduction to which each

corporation was entitled for California State Tax liability.

* * * *

VII

CIVIL LIABILITIES

19. Mr. Kawashima agrees to work with the IRS, to the extent feasible, to resolve all back taxes owed by NSC, Cho Cho San, Inc. or by Mr. Kawashima in his personal capacity to the United States, and then, if he is able, to pay all back taxes, interest and any penalties (collectively hereafter "civil liabilities") determined to be due the United States through available settlement or compromise procedures or by a final decision of the United States tax Court, to be due the United States according to a schedule determined jointly by Mr. Kawashima and the IRS. The parties agree that Mr. Kawashima, NSC, and Cho Cho San, Inc. reserve and retain any and all rights available to them to resolve the civil liabilities.

* * * *

XI

NO OTHER CHARGES TO BE INSTITUTED AGAINST MR. KAWASHIMA

25. In exchange for Mr. Kawashima's guilty plea and complete acceptance of responsibility before and at the time of sentencing, this office agrees not

to further criminally prosecute Mr. Kawashima for any federal offenses committed within the jurisdiction of the Central District of California relating to (i) the Kawashimas' individual tax liabilities for 1988 through and including 1991; (ii) NSC's tax liabilities for taxable years ended October 31, 1988 through and including October 31, 1990; and (iii) Cho Cho San Inc.'s tax liabilities for the taxable years ended December 31, 1988 through and including December 31, 1991.

XII

NO ADDITIONAL AGREEMENTS

26. Except as expressly set forth herein, there are no additional promises, understandings or agreements between the government and Mr. Kawashima or his counsel concerning any other criminal prosecution, civil litigation or administrative proceeding relating to any other federal, state or local charges that may now be pending or hereafter be brought against him, or the sentence that might be imposed as a result of his guilty plea pursuant to this Agreement. Nor may any additional agreement, understanding or condition be entered into unless in writing and signed by all parties.

This agreement shall be effective upon execution by Mr. Kawashima, his counsel, and this office.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORA M. MANELLA
United States Attorney

/s/ Steve A. Linick
STEVE A. LINICK
Assistant United States Attorney

I have read this agreement and have carefully reviewed every part of it with my attorney. Those portions of this agreement that I did not understand in English were translated for me from English into Japanese. I understand the terms of this agreement, and I voluntarily agree to each of the terms. Before signing this agreement, and I consulted with my attorney. My attorney fully advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. No other promises or inducements have been made to me, other than those contained in this agreement. Furthermore, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

7/8/97 /s/ Akio Kawashima
Date Akio Kawashima, Defendant

I am Akio Kawashima's attorney. I have carefully reviewed every part of this agreement with my client. Further. I have fully advised my client of his rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of

entering into this agreement. To my knowledge, my client's decision to enter into this agreement in an informed and voluntary one.

7/14/97 /s/ Jeffrey G. Varga
Date Jeffrey G. Varga
Paul, Hastings, Janofsky & Walker, LLP
Counsel for Defendant Akio Kawashima

Akio Kawashima asked me to translate certain portions of this agreement from English to Japanese. I translated those portions of this agreement from English to Japanese for Akio Kawashima.

7/14/97 /s/ Haruki Minaki
Date Haruki Minaki
Paul, Hastings, Janofsky & Walker LLP
Counsel for Defendant Akio Kawashima

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

United States of America,
Plaintiff

v

Fusako Kawashima,
Defendant

NO. CR 97-746-RMT

GOVERNMENT'S FILING OF A PLEA AGREEMENT

Plaintiff United States of America, through its counsel, United States Attorney STEVE A. LINICK, hereby files the plea agreement in above-entitled matter.

Dated: August 11, 1997.

NORA M. MANELLA
United States Attorney

DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

/s/ Steve A. Linick
STEVE A. LINICK
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

PLEA AGREEMENT

United States v. Fusako Kawashima

I

INTRODUCTORY PARAGRAPH

1. This constitutes the plea agreement between Fusako Kawashima ("Ms. Kawashima") and the United States Attorney's Office for the Central District of California ("this office") related to the investigation of Fusako Kawashima for violations of the Internal Revenue Code (Title 26, United States Code).

II

PLEA

2. Ms. Kawashima agrees to waive indictment by a grand jury and plead guilty to the count in an information charging him with subscribing to a false U.S. Corporation Income Tax Return for the taxable

year ending October 31, 1991, in violation of 26 U.S.C. § 7206(2).

III

NATURE OF THE OFFENSE

3. In Order for Ms. Kawashima to be guilty of violating 26 U.S.C. § 7206(2), the government must prove the following elements beyond a reasonable doubt: (i) Ms. Kawashima knowingly and willfully assisted her husband in preparing a false tax return; (ii) the tax return was false as to a material matter; and (iii) Ms. Kawashima did not believe the return to be true and correct as to a material matter. A person acts "willfully" by voluntarily and intentionally assisting another to do something that the person knows disobeys the law. By signing this agreement, Ms. Kawashima admits that she is, in fact, guilty of this offense.

IV

PENALTIES

4. The statutory maximum sentence that the Court can impose for a conviction of 26 U.S.C. § 7206(2) is three years incarceration, a one year period of supervised release, a fine of $100,000, along with the costs of prosecution, and a special assessment of $50.00. Ms. Kawashima recognizes that he may be deported as a result of his conviction.

5. In addition, Ms. Kawashima understands that the court can order him to pay restitution of $245,126.00. Ms. Kawashima agrees that the

restitution order is not restricted to the amounts alleged in the count to which he is pleading guilty. Ms. Kawashima further agrees that any restitution imposed by the court may not be discharged, in whole or in part, in any present or future bankruptcy proceeding. The United States agrees that any amount that Ms. Kawashima pays in restitution shall be applied against any civil tax liability of Nihon Seibutsu Kagaku Center, Inc. ("NSC") and/or Cho Cho San, Inc.

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FACTUAL BASIS

7. Ms. Kawashima and this Office agree and stipulate to the statement of facts below:

During the taxable years ended October 31, 1985 through October 31, 1991, Ms. Kawashima's husband, Akio Kawashima operated Cho Cho San, a Japanese Restaurant located at 19010 Ventura Boulevard, Tarzana, California ("the Tarzana

Restaurant") . The Tarzana Restaurant, which began doing business in 1983, operated under the corporate name of NSC, a California corporation incorporated on November 3, 1981. During the taxable years ended October 31, 1985 through October 31, 1991, Akio Kawashima owned a portion of the shares of NSC.

During the taxable years ended December 31, 1988 through December 31, 1991, Ms. Kawashima and her husband, Akio Kawashima (collectively referred to as the "Kawashimas") operated Cho Cho San, a Japanese restaurant located at 400 East Thousand Oaks Boulevard, Thousand Oaks, California ("the Thousand Oaks Restaurant"). The Thousand Oaks Restaurant, which began operating in or about September, 1988, is owned by Cho Cho San, Inc., a California corporation incorporated on January 20, 1987. During the taxable years ended December 31, 1988 through December 31, 1991, the Kawashimas ownership interest in Cho Cho San, Inc., in the aggregate, totaled 50%, with Ms. Kawashima owning a 20% interest and Akio Kawashima owning a 30% interest.

On or about January 14, 1992, Akio Kawashima signed and thereafter caused to filed with the United States Internal Revenue Service ("IRS") a U.S. Corporation Income Tax Return (Form 1120) on behalf of NSC for the taxable year ended October 31, 1991. This tax return contained a written declaration that it was being signed under penalty of perjury. Ms. Kawashima assisted in the preparation of this return and knew that it was materially false in that it failed to report all the

taxable income that NSC earned during the taxable year ended October 31, 1991. Ms. Kawashima acted willfully in assisting her husband to underreport income on this return.

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as determined by the corporate tax schedule for the applicable year, for a total actual tax loss of $245,126. The tax loss calculation takes into account the federal income tax deduction to which each corporation was entitled for California State Tax liability.

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XI

NO OTHER CHARGES TO BE INSTITUTED AGAINST Ms. KAWASHIMA

25. In exchange for Ms. Kawashima's guilty plea and complete acceptance of responsibility before

and at the time of sentencing, this office agrees not to further criminally prosecute Ms. Kawashima for any federal offenses committed within the jurisdiction of the Central District of California relating to (i) the Kawashimas' individual tax liabilities for 1988 through and including 1991; (ii) NSC's tax liabilities for taxable years ended October 31, 1988 through and including October 31, 1990; and (iii) Cho Cho San Inc.'s tax liabilities for the taxable years ended December 31, 1988 through and including December 31, 1991.

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This agreement shall be effective upon execution by Ms. Kawashima, his counsel, and this office.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORA M. MANELLA
United States Attorney

/s/ Steve A. Linick
STEVE A. LINICK
Assistant United States Attorney

I have read this agreement and have carefully reviewed every part of it with my attorney. Those portions of this agreement that I did not understand in English were translated for me from English into Japanese. I understand the terms of this agreement, and I voluntarily agree to each of the terms. Before signing this agreement, and I consulted with my attorney. My attorney fully advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. No other promises or inducements have been made to me, other than those contained in this agreement. Furthermore, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

7/8 '97 /s/ Fusako Kawashima
Date Fusako Kawashima, Defendant

I am Fusako Kawashima's attorney. I have carefully reviewed every part of this agreement with my client. Further, I have fully advised my client of his rights, of possible defenses, of the Sentencing

Guideline provisions, and of the consequences of entering into this agreement. To my knowledge, my client's decision to enter into this agreement in an informed and voluntary one.

7/14/97 /s/ Jeffrey G. Varga
Date Jefferey G. Varga
Paul, Hastings, Janofsky & Walker LLP
Counsel for Defendant Fusako Kawashima

Fusako Kawashima asked me to translate certain portions of this agreement from English to Japanese. I translated those portions of this agreement from English to Japanese for Fusako Kawashima.

7/14/97 /s/ Haruki Minaki
Date Haruki Minaki
Paul, Hastings, Janofsky & Walker LLP
Counsel for Defendant Fusako Kawashima

OPPOSITION BRIEF

No. 10-577

In the Supreme Court of the United States

AKIO KAWASHIMA AND FUSAKO KAWASHIMA,
PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In 8 U.S.C. 1101(a)(43)(M), the term "aggravated felony" is defined to include an offense that

> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The questions presented are as follows:

1. Whether a conviction for a felony tax offense under 26 U.S.C. 7206(1) or (2) can constitute an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i).

2. Whether the court of appeals lacked authority to remand petitioner Fusako Kawashima's case for further agency consideration of whether she has been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) in light of *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009).

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In the Supreme Court of the United States

No. 10-577

AKIO KAWASHIMA AND FUSAKO KAWASHIMA,
PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 615 F.3d 1043. Prior opinions of the court of appeals (Pet. App. 32a-52a, 53a-82a, and 83a-100a), each of which was withdrawn, are reported at 593 F.3d 979, 530 F.3d 1111, and 503 F.3d 997. The decisions of the immigration judge (A.R. 47-48, Pet. App. 101a-106a, 107a) and the Board of Immigration Appeals (Pet. App. 108a, A.R. 165, and Supp. A.R. 2-3) are unreported.[1]

[1] The court of appeals considered petitions for review of the agency decisions ordering petitioners' removal and refusing to reopen their proceedings. "A.R." refers to the administrative record filed in 9th Cir. No. 04-74313 (pertaining to orders affirming removal). "Supp. A.R." refers to the administrative record filed in 9th Cir. No. 05-74408 (pertaining to denials of reopening).

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010, and a petition for rehearing en banc was denied on the same day (Pet. App. 2a). The petition for a writ of certiorari was filed on November 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who has been admitted to the United States and is subsequently convicted of an aggravated felony is subject to removal from the United States upon the order of the Attorney General. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, the term "aggravated felony" is defined as including

> an offense that—
>
> > (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
> >
> > (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. 1101(a)(43)(M).

Two years ago, this Court held that, unlike the reference to "fraud or deceit" in Subparagraph (M)(i), the $10,000-loss threshold in that subparagraph "does not refer to an element of the fraud or deceit crime," and should be evaluated on the basis of a "circumstance-specific" approach rather than a "categorical" or "modified categorical" approach. *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298, 2300-2303 (2009). In *Nijhawan*, the petitioner had been convicted of conspiring to commit fraud, but the jury in his criminal trial did not make any find-

ings about the amount of loss to the victims of the fraud. *Id.* at 2298. The Court nevertheless concluded that Nijhawan had been convicted of an aggravated felony under Subparagraph (M)(i) and that the immigration judge (IJ) properly relied on sentencing-related material from the criminal proceeding to establish that the government had satisfied its burden under 8 U.S.C. 1229a(c)(3)(A) of proving by "clear and convincing" evidence a loss in excess of $10,000. 129 S. Ct. at 2303.

2. Petitioners here, a husband and wife, are natives and citizens of Japan who were admitted to the United States as lawful permanent resident aliens in 1984. Pet. App. 101a. They operated restaurants incorporated in California, and were part owners of those corporate entities. *Id.* at 118a-119a, 128a-129a. In August 1997, petitioners were convicted upon guilty pleas of violating the Internal Revenue Code: Akio Kawashima was convicted of willfully making and subscribing a false corporate tax return for the tax year ending October 31, 1991, in violation of 26 U.S.C. 7206(1), and his wife, Fusako Kawashima, was convicted of assisting him in preparing a false corporate tax return, in violation of 26 U.S.C. 7206(2), for the same tax year. Pet. App. 2a, 90a, 95a. Petitioners' plea agreements, executed in July 1997, each included an acknowledgment that the tax return was false as to a material matter; that the petitioner did not believe the return to be true and correct as to a material matter; and that the petitioner acted willfully. *Id.* at 117a, 123a-124a, 127a, 133a-134a.[2] Each plea agree-

[2] The petition appendix reprints petitioner Fusako Kawashima's plea agreement, Pet. App. 125a-134a, even though the court of appeals correctly stated that, unlike her husband's plea agreement, it was not part of the record before the court of appeals or the Board of Immigration Appeals, *id.* at 22a, 24a, 94a.

ment also included a stipulation that the "total actual tax loss" associated with their offenses was $245,126. *Id.* at 120a, 131a.

In August 2000, the Immigration and Naturalization Service (the predecessor to the Department of Homeland Security (DHS)) charged each petitioner with having been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) and (ii), and with being deportable based on those convictions. Pet. App. 102a. Appearing through counsel, petitioners admitted that they had been convicted of violating Section 7206(1) or (2), but they denied the allegation that the loss to the victim or the revenue loss to the government exceeded $10,000, denied the charge of deportability, and moved to terminate the proceedings. Pet. App. 102a-103a; A.R. 161, 189. In an oral decision issued on February 14, 2001, the IJ sustained the charges of deportability and ordered petitioners removed to Japan. Pet. App. 103a.

3. On appeal, the Board of Immigration Appeals (Board) determined that the tape recording of a part of the proceedings was defective, preventing its review, and remanded the case for further proceedings before the IJ. Pet. App. 103a. On remand, the IJ received additional briefing and argument about petitioners' deportability, ruled that they were deportable as charged, and again ordered their removal to Japan. *Id.* at 104a-105a; A.R. 47-48.

On August 16, 2004, the Board affirmed the orders of removal without separate opinion. Pet. App. 108a; A.R. 165.

4. On August 27, 2004, petitioners filed a single petition for judicial review, which was docketed as the first document in Ninth Circuit No. 04-74313. In the caption, the petition for review listed both Akio Kawashima and

Fusako Kawashima as "Petitioners" and included the agency file number from both of their cases. 9th Cir. No. 04-74313 Doc. 1. The text of the petition read as follows: "Mr. & Mrs. Kawashima hereby petition the court for review of the appended Order of the Board of Immigration Appeals, entered on August 16, 2004, which dismissed his [*sic*] appeal on Immigration Judge's June 24, 2003, decision denying their application for Cancellation of Removal." *Ibid.* Attached to the petition were the Board's two orders affirming the order of removal pertaining to each petitioner. *Ibid.*

That petition for review was later consolidated with a separate petition for review that petitioners filed, docketed as Ninth Circuit No. 05-74408, which challenged the Board's intervening denial of petitioners' motion to reopen proceedings to permit them to apply for discretionary relief from removal (Supp. A.R. 2-3).[3]

As relevant to the petition for a writ of certiorari, the court of appeals ultimately denied the petition for review of the order of removal with respect to Akio Kawashima, but, with respect to Fusako Kawashima, the court granted the petition and remanded for further proceedings in light of this Court's decision in *Nijhawan*. Pet. App. 23a, 27a, 31a.

As the case progressed, the court of appeals issued four opinions. It repeatedly held that offenses under 26 U.S.C. 7206(1) and (2) can qualify as aggravated felonies

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[3] Petitioners filed a motion to reopen with the Board in April 2005. In that motion, petitioners asserted that they had pleaded guilty in April 1996 and requested a grant of discretionary relief from removal under 8 U.S.C. 1182(c) (1994) (repealed 1996). The Board issued a written decision denying that motion in June 2005. Supp. A.R. 2-3. In this Court, petitioners have not renewed their challenge to the Board's disposition of the motion to reopen.

under 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 15a-20a. The court held that both of petitioners' convictions were for "offense[s] that involve[] fraud or deceit." *Id.* at 17a; see also *id.* at 22a-24a. The court reasoned that, on the basis of "the plain meaning of the statutory language," Subparagraph (M)(i) encompasses tax offenses involving fraud and deceit when the tax loss exceeds $10,000. *Id.* at 17a. The court acknowledged that a divided panel of the Third Circuit had ruled otherwise in *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218 (2004), but it declined to follow that decision. Pet. App. 17a-20a. Those aspects of the court's opinion did not change between the court's successive opinions. See *id.* at 38a-42a, 86a-90a. Those successive opinions did, however, differ with respect to whether the $10,000-loss threshold under Subparagraph (M)(i) had been satisfied.

In its initial decision, issued on September 18, 2007, the court of appeals held that the $10,000-loss threshold was proved in Akio Kawashima's case by the stipulation in his plea agreement regarding "the total actual tax loss" resulting from his crime. Pet. App. 93a. The court observed that Fusako Kawashima's plea agreement was not in the record and that she had "expressly denied that such loss occurred"; the court thus concluded that the $10,000-loss threshold had not been proved with respect to her. *Id.* at 94a-96a. It refused to remand for further consideration or submission of documents pertaining to her, observing that, under circuit precedent, "the government should not have a second bite at the apple." *Id.* at 96a.

On July 1, 2008, the court of appeals granted petitioners' petition for rehearing. The court withdrew its initial opinion and issued a superseding per curiam opinion and judgment in which it granted the petition for review

of the order of removal as to both petitioners and ruled that neither petitioner is removable from the United States. Pet. App. 60a-66a. The court explained that it had reconsidered its decision in view of a Ninth Circuit en banc decision concerning a different ground of removability within the Immigration and Nationality Act (INA) that was issued the day after the initial decision in this case. *Id.* at 54a (citing *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc)). In light of that decision, the court ruled that the $10,000-loss threshold could not be proved by considering matters beyond the elements of the offense of conviction, and reasoned that, because loss to a victim or victims was not an element of 26 U.S.C. 7206(1) or (2), petitioners' offenses could not be aggravated felonies under Subparagraph (M)(i). Pet. App. 61a-66a.[4] The government petitioned for panel rehearing and rehearing en banc.

While the government's rehearing petition was pending, this Court granted certiorari in *Nijhawan* v. *Mukasey*, 129 S. Ct. 988 (2009), to address whether an offense involving fraud could satisfy Subparagraph (M)(i) when the $10,000-loss threshold could not be satisfied by the elements of that offense. See Pet. App. 13a. In its decision on the merits in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), this Court expressly rejected the view that the court of appeals had taken in its July 1, 2008, opinion

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[4] Judge O'Scannlain, joined by Judge Callahan, filed a specially concurring opinion. Pet. App. 68a-82a. In Judge O'Scannlain's view, the court's superseding opinion "faithfully applie[d]" circuit precedent, *id.* at 68a, but it compelled an "illogical result * * * in this particular case," *id.* at 72a. Judge O'Scannlain suggested that the Ninth Circuit's "reformulation of the modified categorical approach" was not a "reasonabl[e] interpret[ation]" of the INA and should be reconsidered. *Id.* at 81a-82a.

in this case. See *id.* at 2298 (citing *Kawashima II* as part of the underlying circuit split).

On January 27, 2010, after receiving supplemental briefing about the effect of *Nijhawan* on this case, the court of appeals withdrew its second opinion and issued a superseding opinion and judgment. Pet. App. 33a-52a. As it had in its initial opinion, the court held that offenses under 26 U.S.C. 7206(1) and (2) could constitute aggravated felonies under Subparagraph (M)(i), notwithstanding the specific reference in Subparagraph (M)(ii) to tax-evasion offenses under 26 U.S.C. 7201. Pet. App. 38a-42a. The court further held that Akio Kawashima's offense under Section 7206(1) was one involving fraud or deceit and that the Board had used "fundamentally fair procedures" in finding that the $10,000-loss threshold was satisfied, because he had stipulated in his plea agreement that the "total actual tax loss" associated with the offense was $245,126. *Id.* at 43a-44a.

With respect to Fusako Kawashima, the court of appeals determined that her offense under Section 7206(2) was also one that "necessarily 'involves fraud or deceit.'" Pet. App. 45a. For purposes of establishing whether the $10,000-loss threshold had been satisfied, the court recognized that, in light of this Court's intervening decision in *Nijhawan*, there might be adequate evidence for the Board to determine that her offense involved a loss exceeding $10,000. *Id.* at 46a-47a. It thus remanded to the Board for further consideration and receipt of additional evidence concerning whether her conviction satisfied the $10,000-loss threshold. *Id.* at 47a-49a. In a footnote, the court addressed petitioners' contention (in a supplemental brief) that Fusako Kawashima's case was no longer before the court be-

cause neither party had sought rehearing with respect to her as opposed to Akio Kawashima after the court's initial decision in September 2007. *Id.* at 45a n.8. The court rejected that argument, stating that, because its mandate had not issued, its judgment "remain[ed] subject to modification, either at the request of a party or *sua sponte*," and her case was still pending before the court and subject to decision in light of *Nijhawan*. *Ibid.*

On August 4, 2010, the court of appeals denied rehearing en banc and issued a final superseding opinion that was, as relevant here, materially identical to the January 27, 2010, opinion. Pet. App. 2a, 12a-31a.

Judge Graber, joined by Judges Wardlaw and Paez, dissented from the denial of rehearing en banc. Pet. App. 3a-12a. Judge Graber acknowledged that the phrase "loss to the victim or victims" in Subparagraph (M)(i) "is broad enough that it *might* encompass a tax revenue loss to the government." *Id.* at 3a. In her view, however, when the statute is considered as a whole, Subparagraph (M)(ii) defines the universe of tax offenses that might constitute aggravated felonies under 8 U.S.C. 1101(a)(43). Pet. App. 6a-10a.

ARGUMENT

1. Petitioners renew their contention (Pet. 13-15, 19-24, 29-33) that felony tax offenses other than violations of the tax-evasion statute, 26 U.S.C. 7201, cannot qualify as "aggravated felon[ies]" under 8 U.S.C. 1101(a)(43)(M)(i), even if they involve fraud or deceit in which the loss to the victim exceeded $10,000. While that issue has precipitated a narrow disagreement among three circuits, the decision below is correct and the narrow circuit split does not warrant review at this time. Last Term, the Court denied certiorari on this

question in *Arguelles-Olivares* v. *Holder*, 130 S. Ct. 736 (2009) (No. 08-1494), and the same result is warranted here.

a. Petitioners contend that the reference to tax evasion in Subparagraph (M)(ii) prevents any other federal felony tax offense from being an aggravated felony under Subparagraph (M)(i). In the course of that argument, petitioners rely on three canons of statutory construction, but none of them supports the conclusion they draw in this case.

First, petitioners contend (Pet. 18-22) that the canon against superfluities should be applied to limit the universe of tax felonies that may constitute aggravated felonies to those offenses covered by Subparagraph (M)(ii), because Subparagraph (M)(ii) would otherwise be rendered superfluous. But that argument relies on the incorrect assumption that the tax-evasion offenses covered by Subparagraph (M)(ii) are entirely subsumed within the fraud or deceit offenses covered by Subparagraph (M)(i). The offense of tax evasion can entail, but does not necessarily require, proof of fraud or deceit; it requires only that a person "willfully attempt[] *in any manner* to evade or defeat" a tax. 26 U.S.C. 7201 (emphasis added); see also *United States* v. *Johnson*, 319 U.S. 503, 515 (1943) ("The false return filed on March 15th was only one aspect of what was a process of tax evasion."); *United States* v. *Mal*, 942 F.2d 682, 688 (9th Cir. 1991) (noting that an offense under Section 7201 can be accomplished "in any manner") (quoting *Spies* v. *United States*, 317 U.S. 492, 499 (1943)); *United States* v. *Gordon*, 242 F.2d 122, 125 (3d Cir.) ("to conclude that the willful filing of a false report or return is the only way 'to evade or defeat any tax' is to give too narrow a construction to a statute which was intended to be more

comprehensive") (citing *Johnson*, 319 U.S. at 515)), cert. denied, 354 U.S. 921 (1957). As a result, even if many tax offenses—including many tax-evasion offenses—involve fraud or deceit and thus also fall within the language of Subparagraph (M)(i), Congress still had reason to add Subparagraph (M)(ii) to capture any instances of tax evasion that do not fall within Subparagraph (M)(i) because 26 U.S.C. 7201 does not include fraud or deceit as an element. See *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 227 (3d Cir. 2004) (Alito, J., dissenting). When a provision is not superfluous, the canon against superfluities does not apply. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (canon does not apply where construction of statutes "would not render one or the other wholly superfluous"); *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (canon lends "sparse support" to challenge when challenged construction "does not necessarily render" provision superfluous). Thus, the court of appeals correctly rejected this argument, concluding that "there are many reasons why Congress might have included [Subparagraph] (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of [Subparagraph] (M)(i)." Pet. App. 19a.

Second, petitioners invoke (Pet. 22-23) the canon that the "specific governs the general," arguing that the reference in Subparagraph (M)(ii) to a "revenue loss to the Government" is specific and prevents offenses involving such losses from falling within the reference in Subparagraph (M)(i) to a "loss to the victim." But this Court has explained that it understands this canon of statutory construction "as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v.

Howe, 516 U.S. 489, 511 (1996) (citation omitted). As in *Varity Corp.*, there is no reason to suppose that Congress intended its inclusion of a specific additional category of offenses in the definition of aggravated felony to serve as a *limitation* on other categories that apply by their terms—especially when the definition of aggravated felony "has always been defined expansively." *INS* v. *St. Cyr*, 533 U.S. 289, 295 n.4 (2001). Here, the specific reference to "tax evasion" in Subparagraph (M)(ii) would govern more general references, but only with regard to the category of offenses to which it speaks (tax evasion).

In addition, to the extent that petitioners assume (Pet. 21-22) that any offense involving "loss to the Government" (as opposed to some other "victim") must fall within Subparagraph (M)(ii) if it is to be an aggravated felony, that assumption is refuted by this Court's decision in *Nijhawan*. There, the Court reasoned from the proposition that several fraud offenses involving losses to the government would fall within the scope of Subparagraph (M)(i). See 129 S. Ct. at 2301 (citing, *inter alia*, offenses involving conspiracy to defraud the United States, theft in federally funded programs, fraud in connection with a health-care-benefit program, and contract fraud against the United States); see also *Balogun* v. *United States Att'y Gen.*, 425 F.3d 1356, 1360-1361 (11th Cir. 2005) (holding that conviction for embezzling and conspiring to embezzle more than $10,000 from the United States government was an aggravated felony under Subparagraph (M)(i)), cert. denied, 547 U.S. 1113 (2006). Accordingly, Subparagraph (M)(i) may indeed encompass offenses resulting in losses to the government.

Third, petitioners contend (Pet. 23, 29-33) that any ambiguity in the statute should be construed in their favor, as aliens who stand to be removed from the United States. Yet, because the other canons of statutory construction they invoke do not have the effects they claim, there is no such ambiguity. To the contrary, "the clear language" of Subparagraph (M)(i), *Ki Se Lee*, 368 F.3d at 227 (Alito, J., dissenting), includes petitioners' convictions to the extent that their offenses "involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000." 8 U.S.C. 1101(a)(43)(M)(i); see also Pet. App. 17a.[5]

Moreover, although petitioners suggest (Pet. 29) that a disagreement in the circuits (or among judges within individual circuits) establishes that Subparagraph (M)(i) "is clearly ambiguous[] as an empirical matter," that proposition would have required a different result in *Nijhawan*, which resolved a circuit split by affirming the judgment and sustaining the alien's removal, see 129 S. Ct. at 2298. And this Court does not even apply such a rule in the context of criminal cases. See, *e.g.*, *United States* v. *Hayes*, 129 S. Ct. 1079, 1083 n.3, 1088-1089 (2009) (finding the rule of lenity inapplicable because statute, while "not a model of the careful drafter's art," was not ambiguous, even though the circuits had divided on the underlying question). In any event, even if there were any ambiguity, the Attorney General has authority under the INA to resolve statutory ambiguities in the

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[5] Petitioners mistakenly assert (Pet. 23) that the court of appeals "disregard[ed], without explanation * * *, the principle[] * * * that unclear statutes affecting deportation should not be construed against an alien." The court of appeals squarely addressed the point, stating that the canon "is inapplicable where, as in this case, the statutory language is clear." Pet. App. 19a n.6.

first instance. See, *e.g.*, *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (finding statutory provision ambiguous, but remanding to the Board for it to address the question in the first instance, rather than deferring to the narrowing construction offered by the alien); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (reversing decision of court of appeals for its failure to give *Chevron* deference to a decision of the Board). A rule requiring that ambiguity be resolved in the alien's favor would usurp the interpretive authority of the Attorney General that this Court has confirmed in *Aguirre-Aguirre* and *Negusie*.

Thus, the court of appeals correctly concluded that a felony tax offense other than tax evasion may be an aggravated felony under Subparagraph (M)(i).

b. Although petitioners correctly state that there is a division in the courts of appeals about whether tax offenses other than tax evasion may be aggravated felonies under Subparagraph (M)(i), only three circuits have spoken to the question. Compare Pet. App. 16a-20a (holding that they may be); *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 174 (5th Cir. 2008) (same), cert. denied, 130 S. Ct. 736 (2009), with *Ki Se Lee*, 368 F.3d at 222-225 (3d Cir.) (holding that they may not be). Last Term, this Court denied certiorari on the question in *Arguelles-Olivares*, 130 S. Ct. 736. Only one circuit (the Ninth Circuit, in this case) has addressed the question since this Court's decision in *Nijhawan*, which construed Subparagraph (M)(i). Thus, the narrow disagreement in the courts of appeals may be resolved without further intervention of this Court. Accordingly, review by this Court now would be premature.

2. Petitioners also contend (Pet. 16, 24-29) that their convictions for violating 26 U.S.C. 7206(1) and (2) do not

satisfy Subparagraph (M)(i) because those crimes do not include fraud or deceit as an element. With respect to that question, the decision below is correct and has occasioned no disagreement in the courts of appeals. Indeed, none of the opinions on which petitioners otherwise rely for their initial argument embraced this argument. Every one of those cases involved a conviction under Section 7206(1), but none of the opinions concluded that such an offense does not involve fraud or deceit; they reasoned instead that Subparagraph (M)(ii) addresses the only tax offenses that may be aggravated felonies. See Pet. App. 3a-12a (Graber, J., dissenting from denial of rehearing en banc); *Arguelles-Olivares*, 526 F.3d at 182-184 (Dennis, J., dissenting); *Ki Se Lee*, 368 F.3d at 222-225; *Abreu-Reyes* v. *INS*, 292 F.3d 1029, 1037-1038 (9th Cir. 2002) (Paez, J., dissenting).

The court of appeals correctly observed that the elements of 26 U.S.C. 7206(1) and (2) require the government to prove that the defendant signed or assisted in creating a "false" tax return "willfully" (*i.e.*, with specific intent to provide a false statement). Pet. App. 22a-24a. Petitioners do not dispute that. See Pet. 27. Their argument rests entirely on the premise that Section 7206(1) and (2) do not require proof of a specific intent to *defraud*. See Pet. 24-29 (discussing, principally, *United States* v. *Bishop*, 412 U.S. 346 (1973), *Considine* v. *United States*, 683 F.2d 1285 (9th Cir. 1982), and *Wright* v. *Commissioner*, 84 T.C. 636 (1985)). But, even assuming that is true, it could not change the fact that the willful falsity that is indisputably required by Section 7206(1) and (2) is the very definition of "deceit." See, *e.g.*, *Black's Law Dictionary* 465 (9th ed. 2009) (defining "deceit" as "1. The act of intentionally giving a false impression," and "2. A false statement of fact made

by a person knowingly or recklessly"). Accordingly, petitioners' offenses "unquestionably 'involve[d] fraud or deceit.'" *Arguelles-Olivares*, 526 F.3d at 173.

3. Finally, petitioners contend (Pet. 33-36) that the court of appeals lacked jurisdiction to alter its judgment with respect to Fusako Kawashima after this Court's decision in *Nijhawan* because, under Federal Rule of Appellate Procedure 41(a), the court of appeals should have released the mandate associated with its judgment about her seven days after its initial decision in September 2007. The decision below on this ground (Pet. App. 23a n.7) is case-specific and correct, and it does not conflict with any decision of this Court or another court of appeals. Further review is thus unwarranted.

Petitioners' argument apparently proceeds on the assumption that Fusako Kawashima had a petition for review of her removal order that was separate from that of her husband, and that she consequently had a separate case pending in the court of appeals that could be disposed of through a separate judgment and order. See Pet. 33-34; see also Pet. 8 ("The Kawashimas timely filed separate petitions for review."); *ibid.* ("[T]he Ninth Circuit denied Mr. Kawashima's petition."); Pet. 9 ("The Government did not seek rehearing of the Court's decision granting Mrs. Kawashima's petition."). That premise is not supported by the record. Although the Board disposed of petitioners' appeal of the IJ's decision by separate orders pertaining to each petitioner, petitioners chose to file a single petition for review in the court of appeals, attaching both Board orders. See pp. 4-5, *supra* (describing the single petition for review filed on August 27, 2004, to initiate proceedings in the court of appeals). Petitioners never amended their petition or asked the court of appeals to sever their cases.

Because there was thus only one "case" before the court of appeals, Rule 41(d)(1) of the Federal Rules of Appellate Procedure dictated that, when Akio Kawashima filed "a petition * * * for rehearing en banc," that petition had the effect of "stay[ing] the mandate until disposition of the petition or motion." Fed. R. App. P. 41(d)(1). The same thing was true when the government later filed a timely petition for rehearing of the court's second decision issued in July 2008.

None of the authorities petitioners cite (Pet. 35-36) suggests otherwise, because they each stand for the simple proposition that a case becomes final when a party fails to appeal or when the appeal is concluded. None of those cases involved a situation in which a party failed to pursue further review against one adversary but not against another.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

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REPLY BRIEF

No. 10-577

In The Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

Thomas J. Whalen*
**Counsel of Record*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin
& Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners, Akio and Fusako Kawashima (the "Kawashimas"), herewith submit their Reply to the Opposition Brief of Respondent.*

ISSUES BEFORE THE COURT

The primary issue presented for review involves a direct conflict in the Circuits which is not disputed by the Respondent. (Opp. 14.)

When one examines the aggravated felony statute, 8 U.S.C. § 1101(a)(43), most of the aggravated felonies listed are tied to specific statutory violations, leaving no uncertainty or ambiguity about whether a crime that has been committed calls for deportation. However, in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court recognized that parts of the aggravated felony statute were not succinct, clear and explicit in defining whether a particular crime was a removable offense.

Where the statute is not clear and explicit, but instead vague and ambiguous, the remedy the Court mandated in *Padilla* does not resolve the issue. In this case, learned judges in the Circuits have disagreed about the application of 8 U.S.C. §

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* Respondent's Brief in Opposition is referred to as "Opposition," and cited as "Opp. __;" the Petition is cited as "Pet. __."

1101(a)(43)(M).[1] With exile and deportation at risk, due process and fair notice require that a statute set forth clearly what is a deportable offense. (Pet. 15-17, 32.) As this Court recently recognized: "[t]o satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010); *see also Black v. United States*, 130 S. Ct. 2963 (2010).

From this fundamental notion of due process and fairness has evolved the rule of lenity. Despite the disputes among and within the Circuits on the application of 8 U.S.C. § 1101(a)(43)(M)(i),[2] the Solicitor General maintains that the statute is clear to avoid the application of the rule of lenity.

The disputed issue in the case at bar is: whether a tax crime conviction under 26 U.S.C. § 7206 was intended by Congress to be an aggravated felony under (M)(i). (M)(i) provides that an aggravated felony is an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." At the same time, 8 U.S.C. § 1101(a)(43)(M)(ii)[3] provides that tax evasion under 26 U.S.C. § 7201 is an aggravated felony when the "revenue loss to the Government exceeds $10,000."

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1 Hereinafter, "(M)."

2 Hereinafter, "(M)(i)."

3 Hereinafter, "(M)(ii)."

The statutory ambiguity of (M) is at the heart of this case. Respondent's Opposition does nothing to reconcile the statutes or justify Petitioners' deportation. The Petitioners' construction is faithful to the honored canons of construction and the rule of lenity is applicable.

ARGUMENT

I. The Solicitor General Fails to Adhere to Well-Established Canons of Statutory Construction in its Interpretation of 8 U.S.C. § 1101(a)(43)(M)(i).

A. Consistent with the Rule Against Superfluities, if Tax Crimes Involving Fraud or Deceit Were Intended to be Covered in (M)(i), There Would be no Reason for Congress to Enact (M)(ii) in 8 U.S.C. § 1101(a)(43).

Despite Congress' enactment of (M)(ii) specifying tax evasion as an aggravated felony, the Solicitor General argues that the Kawashimas' tax crimes of conviction under 26 U.S.C. § 7206(1)[4] and (2)[5] are offenses covered by (M)(i) because they are crimes involving "fraud or deceit."

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[4] Hereinafter, "§ 7206(1)."

[5] Hereinafter, "§ 7206(2)."

It is impossible to fathom why tax evasion was specifically designated by Congress as an aggravated felony in (M)(ii) if the offense was already contained in (M)(i) as a crime of "fraud or deceit." The Government's position is directly at odds with the well-established canon of construction which requires that effect be given to all provisions of a statute, so that no part will be inoperative or superfluous. J.D. Shambie Singer, *Statutes and Statutory Construction* (7th Ed. 2007) § 46.6; *see also Corley v. United States*, 129 S. Ct. 1558, 1561 n.5 (2009).

In response, the Solicitor General offers the specious explanation that Congress "might have" added (M)(ii) because fraud is not necessarily an element of the crime of tax evasion and, therefore, tax evasion may not be covered by (M)(i) in some cases. (Opp. 10.) No legislative history or scholarly commentary supports this speculative and unconvincing explanation. The Government has to do better than "might have" when Circuits have vehemently disagreed on the issue, and Petitioners' liberty hangs in the balance after living 27 years in this country.

The Solicitor General argues that (M)(ii) is not superfluous "because 26 U.S.C. § 7201 [tax evasion] does not include fraud or deceit as an element." (Opp. 11.) In fact, tax evasion involves fraud at its core.

In *Spies v. United States*, 317 U.S. 493, 497 (1943), the Court stated that tax evasion is "the

capstone of a system of sanctions which ... were calculated to induce prompt and forthright fulfillment of every duty under the income tax law ..."

A § 7201 violation involves willful attempts to defeat and evade a tax, commonly referred to as "tax fraud." *See Black's Law Dictionary* (9th ed. 2009). The only difference between § 7201 and the civil fraud penalty statute, 26 U.S.C. § 6663, is the burden of proof. In fact, at the time of *Spies*, the civil tax fraud statute that imposed a fraud penalty used the same term: "evade." For these reasons, a conviction of tax evasion under § 7201 collaterally estops the taxpayer from contesting the civil fraud penalty. Contrary to the Solicitor General's argument, with "fraud" at the core of tax evasion, that offense would be covered in (M)(i), thereby rendering M(ii) superfluous. For (M)(ii) to have any effect and not be superfluous, Congress must have intended § 7201 to be *the only* revenue offense covered in 8 U.S.C. § 1101(a)(43)(M).

The Government then argues that while tax evasion may not involve "fraud and deceit" and, therefore, would not be covered by (M)(i), the lesser included and clearly less serious tax offense of making a false statement in violation of §§ 7206(1) and (2) does necessarily include "fraud and deceit" and, therefore, is covered by (M)(i). Filing a false statement under §§ 7206(1) and (2) is essentially a tax perjury offense. Section 7206 allows the Government to obtain a tax conviction for underreporting income where the Government lacks sufficient evidence to obtain a conviction for tax

evasion. Accordingly, the Solicitor General's reasoning defies logic: the greater offense does not necessarily involve "fraud or deceit," but the lesser offense necessarily does.

The Government also does not address the fact that Congress made a distinction between "revenue loss to the Government" in (M)(ii) and "loss to victims" in (M)(i). One of the cornerstones of statutory construction is that effect must be given to all words contained in every provision of a statute. Different words in separate provisions of the same statute were inserted for a purpose: "loss" versus "revenue loss." The language used by Congress in (M)(ii) leads inexorably to the conclusion that crimes involving a revenue loss to the Government are covered in (M)(ii).

Sidestepping the issue, the Government states that (M)(i) covers losses "to the Government" when the Government stands like any other victim as to a monetary loss (*e.g.*, embezzlement of Government funds). (Opp. 12.) The cases cited, however, only establish that the Government can be a "victim" in "fraud or deceit" crimes. Critically, none of these cases were tax cases involving "revenue loss to the Government," which, as Petitioners argue, and the statute expressly provides, are covered in (M)(ii).

Harmonizing (M)(i) and (M)(ii) by applying well-established canons of statutory construction leads unavoidably to the conclusions that Judge Graber arrived at in her dissent in the Court below: (M)(i) and (M)(ii) are mutually exclusive, and (M)(ii) covers tax crimes involving revenue losses to the

Government. *See Kawashima v. Holder*, 615 F.3d 1043, 1046-50 (9th Cir. 2010); Pet. App. A, 3a-12a. Accordingly, the only tax crime that is an aggravated felony and a deportable offense is tax evasion in violation of § 7201.

B. The Doctrine of *Ejusdem Generis* Limits (M)(i)'s Applicability to 26 U.S.C. §§ 7206(1) and (2).

The Solicitor General objects to the Petitioners' invocation of the doctrine of *ejusdem generis*, that "the specific governs the general." (Opp. 8.) The Solicitor General cites *Varity Corporation v. Howe*, 516 U.S. 489 (1996), for the proposition that this canon is a warning against applying a general provision when doing so would undermine limitations created by a more specific provision. (Opp. 11-12.) Petitioners agree.

The Court in *Varity*, however, pointed out that the specific provision involved in that case was not a limitation on the general, but rather an additional remedy. *Varity*, at 511. M(ii) is not an additional, separate, standalone provision; it is a parallel provision enacted at the same time as M(i) and both provisions are to be construed together. In effect, Congress pulled "revenue losses" from losses that might otherwise fall within (M)(i), and (M)(ii) became a limitation on (M)(i).

II. The Solicitor General Erroneously Concludes that (M)(i) and (M)(ii) are Clear and Unambiguous and, Therefore, That the Rule of Lenity is Inapplicable.

The Government contends that the split within and between the Circuits is not evidence that the statute is ambiguous, citing *United States v. Hayes*, 129 S. Ct. 1079 (2009). (Opp. 13.) In *Hayes*, there was no express statement, either way, that a split of opinion evidenced an ambiguity. The Court, however, recognized a split in the Circuits on the construction of the statutory provision there involved and reviewed the case. Ultimately, there was a difference of opinion within the Court on the statute's vagueness and the application of the rule of lenity. *See Hayes*, at 1093; *see also Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006) (where that court held that conflicting opinions on the interpretation of the penal statute resulted in a denial of due process and fair notice).

Moreover, the Solicitor General argues that utilizing the rule of lenity to resolve the ambiguities in (M) in the Kawashimas' favor would usurp the interpretive authority of the Attorney General that this Court has confirmed in *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) and *Negusie v. Holder*, 129 S. Ct. 1159 (2009). (Opp. 13-14.) As the Court stated in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987) (*quoting Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)), the judiciary is the final authority on issues of statutory construction. *Chevron*, however, applies when the Attorney General makes a factual or

judgmental determination allowed under an immigration statute, as was the case in *Cardoza-Fonseca*. The Government's position in this case would foreclose *any* applicability of the rule of lenity in deportation cases, *i.e.*, if a statutory provision is unclear, the Attorney General would have the unilateral authority to resolve any ambiguity as he saw fit, a principle that must be rejected by the Court on its face.

III. The Split in the Circuits is not "Narrow" and the Kawashimas' Case Warrants Review by this Court.

The Solicitor General argues that the split in the Circuits is not serious enough to warrant review by the Court and "that the narrow disagreement in the Courts of appeals may be resolved without further intervention of the Court." (Opp. 14.) The Solicitor General made the same argument as recently as in 2009 by asking the Court not to review *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008), *cert. denied sub nom. Arguelles-Olivares v. Holder*, 130 S. Ct. 736 (2009), which dealt with the same issue. (*See Arguelles-Olivares* Govt. Br. Opp'n 10-11.) Now, this important issue comes to the fore again in a case from the Ninth Circuit. How many similar cases are in the pipeline is unknown, but several people have been deported as a result of at least two Circuits' construction of the statute.

The Government's argument that there is "not enough" of a split misses the point. As shown in the Petition, if the Kawashimas lived and operated their restaurants in Pennsylvania instead of California,

there would be no deportation orders. (Pet. 13.) The Kawashimas, and all others potentially affected by (M), deserve clarity on this ambiguous statute.

Recently, the Court granted review in *Black*, 130 S. Ct. 2963, along with *Skilling*, 130 S. Ct. 2896 and *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010), to determine what conduct Congress rendered criminal by proscribing fraudulent deprivation of the intangible right of "honest services." *Black*, at 2966. Without any apparent conflict among the Circuits, the Court granted certiorari because of the serious vagueness and due process issues arising from 18 U.S.C. § 1346. The case at bar represents an even more compelling need for review by the Court, with the deportation of the Kawashimas imminent, in the face of wide-ranging disagreement in the Circuits as to whether their deportation is lawful under the statute Congress enacted.

The Government in this case is in effect arguing that at least three unlawful deportations (that of the Kawashimas and Arguelles-Olivares) are not enough to warrant consideration by this Court. The Court should reject the Government's position, resolve the ambiguity and the conflict, and, if Petitioners are correct, halt the deportations of the Kawashimas and others in the same position.

IV. Whether Fraud or Deceit is an Essential Element of the Kawashimas' Crimes is Relevant to (M)(i)'s Applicability to Convictions Under § 7206.

The issue in this case is the front end of the issue the Court addressed in *Nijhawan v. Holden*, 129 Sup. Ct. 2294 (2009). In *Nijhawan*, the Court held that for purposes of (M)(i), the $10,000 threshold *was not* an element of the crime of which Nijhawan was convicted. *Id.* at 2302. The Court recognized that the threshold amount is not an element of the crime in most state fraud or deceit statutes. *Id.* at 2305-08. Pursuant to the Court's reasoning in *Nijhawan*, the next logical step is to conclude that unlike the $10,000 loss threshold, fraud or deceit must be an element of the crime of conviction under (M)(i).

In *Nijhawan*, the Court explained that the fraud and deceit crimes covered by (M)(i) are almost exclusively violations of state fraud and deceit statutes. *Id.* at 2302. In contrast, the Court referred to (M)(ii) as the "internal revenue provision." *Id.* at 2301; *see also Spies*, 317 U.S. at 495, 497 (describing tax evasion as a "revenue offense"). The petitioner in *Nijhawan* was convicted of fraud. Fraud, obviously, was an element of the crime of conviction and, therefore, plainly within (M)(i). The Kawashimas' crimes of conviction did not require, as elements of their respective offenses, a finding of fraud or deceit, and the Kawashimas did not admit to "fraud or deceit" in their plea agreements. *See* Plea Agreements, Pet. App. I, 115a; Pet. App. J,

130a. Accordingly, the Kawashimas' crimes of conviction do not fall within the ambit of (M)(i).

The Solicitor General states that "even if there were any ambiguity" in (M)(i), the Court should defer to the Agency's interpretation under *Chevron*. (Opp. 13-14.) To the extent the Agency's construction is relevant at all in a matter of statutory construction, the Board of Immigration Appeals in 2007 held that "it is the elements of the crime an alien is actually convicted of, not the crime he or she may have committed, that is determinative of deportability." *In re Babaisakov*, 24 I & N Dec. 306, 312 (BIA 2007) (*citing In re Pichardo*, 21 I & N Dec. 330, 335 (BIA 1996); (*see also* Pet. 24-29).

Confronted with undisputed record evidence that the Kawashimas' criminal conviction did not require proof, a finding, or an admission that fraud or deceit was involved, the Solicitor General's response, for lack of a better word, is non-responsive. The Solicitor General merely concludes that the decision below "was correct" and that whether "fraud or deceit" is an essential element of the crime of conviction is not a question that has divided the Circuits. (Opp. 15.) On the contrary, the issue before the Court in this case is whether the Kawashimas' crimes of conviction are within (M)(i). Based upon their plea agreements, there was no admission of fraud or deceit by the Kawashimas. In any event, "fraud or deceit" are not necessary elements of § 7206.

V. The Ninth Circuit Erred in Amending the Judgment *Sua Sponte* in the Case of Mrs. Kawashima on the Ground that the Court's Mandate had not Issued.

The Government argues that because the Kawashimas filed a single petition for review, the Ninth Circuit had the authority to amend Mrs. Kawashima's judgment. (Opp. 16-17.) The single Petition notwithstanding, there are two cases, two petitioners, and two separate crimes of conviction. Mrs. Kawashima's case was resolved more than two years ago and the Government did not seek review or otherwise challenge it. There is no basis, and certainly no authority cited by the Solicitor General, that a judgment can be amended two years later *sua sponte* by the Court because a single petition for review had been lodged. Even the Ninth Circuit claimed no such power.

Having cited no authority for its position, the Solicitor General, in conclusion, claims that Petitioners' legal authority is inapposite. (Opp. 17.) The cases the Solicitor General challenges clearly hold that when the Government declines to seek review, and the judgment is *res judicata*, the case cannot be resurrected.

Disputes are between parties and when resolved, Court intervention is unjustified. The amendment of the judgment as to Mrs. Kawashima was in error and the Court should review the Ninth Circuit's decision in this regard and order the deportation order as to Mrs. Kawashima be set aside.

CONCLUSION

The Petition for a Writ of Certiorari should be granted so that the Court can resolve the split between the Ninth and Fifth Circuits, and the Third Circuit involving a legal issue of significant importance requiring national uniformity.

April 18, 2011

Respectfully submitted,

Thomas J. Whalen*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
*** *Counsel of Record***

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

PETITIONER'S BRIEF

RECORD AND BRIEFS

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No. 10-577

In The Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

Thomas J. Whalen*
**Counsel of Record*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin
& Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com

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QUESTION PRESENTED

Whether Petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) respectively were aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i), rendering Petitioners, Akio and Fusako Kawashima, removable.

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BRIEF ON THE MERITS

Petitioners, Akio Kawashima and his wife, Fusako Kawashima, respectfully submit this Brief on the Merits and ask the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case with instructions to set aside the Orders of Deportation.

OPINIONS BELOW

The final opinion of the Ninth Circuit denying Petitioners' motion for rehearing and rehearing *en banc* appears in the Appendix to the Petition for Writ of Certiorari (Pet. App. A, 1a-31a)* and is reported at *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010). Also appearing in the Appendix to the Petition are the initial decision of the Ninth Circuit (Pet. App. D, 83a-100a), reported at 503 F.3d 997; the court's decision following rehearing (Pet. App. C, 53a-82a), reported at 530 F.3d 1111; and the decision withdrawing the court's prior opinion (Pet. App. B, 32a-52a), reported at 593 F.3d 979.

The decision of the United States Immigration Judge denying Petitioners' motion to terminate (Pet. App. E, 101a-106a), the Immigration Judge's order of removal (Pet. App. F, 107a), and the denial of Petitioners' appeal to the Board of Immigration Appeals (Pet. App. G, 108a) are also included in the Appendix to the Petition.

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* Petitioners' Appendix to the Petition for Writ of Certiorari is referred to and cited herein as "Pet App. _, _a."

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 27, 2010. Pet. App. B, 32a-52a. The Ninth Circuit denied Mr. and Mrs. Kawashima's motion for rehearing and for rehearing *en banc* on August 4, 2010. Pet. App. A, 1a-31a.

The Petition for Writ of Certiorari was timely filed on November 1, 2010, and was granted on May 23, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(43), which defines the term "aggravated felony," is included in its entirety in the Statutory Appendix ("St. App.") contained herewith. Also included in the Statutory Appendix are the relevant sections of the Internal Revenue Code, 26 U.S.C. § 7201 and 26 U.S.C. §§ 7206(1) and (2).

The particular statutory provision involved in this case is: **8 U.S.C. § 1101(a)(43)(M)**

> [An aggravated felony is] an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

STATEMENT OF THE CASE

Akio Kawashima and Fusako Kawashima (the "Kawashimas") are natives and citizens of Japan.[1] The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984. The Kawashimas established a successful Japanese restaurant, Cho Cho San, in California, owned by Nihon Seibutsu Kagaku Center, Inc. ("NSC"). Mr. Kawashima owned a portion of the shares of NSC. In 1992, Mr. Kawashima signed a U.S. corporate tax return under the penalty of perjury on behalf of NSC for the tax year ending October 31, 1991.

In 1997, Mr. Kawashima was charged with subscribing to a false statement on the 1991 corporate tax return, in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima was charged with aiding and assisting in the preparation of a false statement on a tax return, in violation of § 7206(2).[2] On August 11, 1997, Mr. Kawashima pled guilty to one count in violation of § 7206(1). Also, on August 11, 1997, Mrs. Kawashima pled guilty to one count in violation of § 7206(2).

In his plea agreement negotiated by his counsel, Mr. Kawashima stipulated that he "knew

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[1] Aiko Kawashima is referred to as Mr. Kawashima and Fusako Kawashima is referred to as Mrs. Kawashima herein.

[2] All references to code sections are to Title 26 unless otherwise noted.

that the return was materially false in that it failed to report all of the taxable income that NSC earned during the taxable year ended October 31, 1991." Pet. App. I, 119a. In her plea agreement, Mrs. Kawashima stipulated that she "acted willfully in assisting her husband to underreport income" on the corporate tax return. Pet. App. J, 130a. In their respective plea agreements, there was no admission of fraud or deceit by either Mr. or Mrs. Kawashima.

Mr. Kawashima stipulated that the total actual tax loss was $245,126.[3] The Government and the Kawashimas stipulated that the applicable sentencing guideline was 2T1.3 of the Sentencing Guidelines, which covers tax crimes. Pet. App. I, 120a; Pet. App. J, 130a.

On August 3, 2000, almost three years after the pleas were entered,[4] the Immigration and

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3 The "actual tax loss" as stated in the plea agreement was the gross amount of income omitted and not reported on the tax return for the year of conviction and for other tax years considered relevant for sentencing purposes. "Actual tax loss" for sentencing purposes does not include any allowable deductions to arrive at a net income figure against which the applicable tax rate is applied, which then would constitute the "actual" revenue or tax loss to the Government. *United States v. Valentino*, 19 F.3d 463, 466 (9th Cir. 1994) (unclaimed allowable depreciation deduction not considered for a § 7206(1) conviction).

4 On April 28, 1995, the Attorney General issued a memorandum to all federal prosecutors entitled "Deportation of Criminal Aliens." *See DOJ Criminal Resource Manual* at 1920-41. The memorandum was

Naturalization Service ("INS") (now the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security) issued separate notices to appear, alleging that Mr. and Mrs. Kawashima were removable (deportable)[5] because their convictions under §§ 7206(1) and (2) constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i).[6]

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designed to effect the "deportation of criminal aliens from the United States as expeditiously as possible." *DOJ Criminal Resource Manual* at 1920. It required aggravated felons to be deported unless "extraordinary circumstances exist" and any exceptions to this policy required written approval of the Department of Justice. *Id.* The Manual in Appendix B set forth a standard plea agreement form, where the immigrant stipulates that he committed an aggravated felony and is deportable. *Id.* at Appendix B. The plea agreement executed by the Government and the Kawashimas in 1997 did not follow this form. The Government waited almost four years to initiate removal proceedings, suggesting uncertainty within the Department of Justice and INS on whether the Kawashimas' crimes of conviction were aggravated felonies.

5 Aliens convicted of an aggravated felony after admission are deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

6 Hereinafter, "(M)(i)."

8 U.S.C. § 1101(a)(43)(M)[7] defines "aggravated felony"[8] as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The notices from the INS did not allege that the Kawashimas' convictions constituted aggravated felonies *for tax evasion* under 8 U.S.C. § 1101(a)(43)(M)(ii).[9] The Kawashimas were not convicted of tax evasion as described in 26 U.S.C. § 7201.

After a removal hearing, the Immigration Judge ("IJ") concluded that Mr. and Mrs. Kawashimas' convictions of their respective tax offenses were "aggravated felonies" under (M)(i) and ordered them removed to Japan. The Kawashimas appealed the decision.

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[7] Hereinafter, "(M)."

[8] 8 U.S.C. § 1101(a)(43) lists the offenses that are "aggravated felonies" as subparagraphs (A) through (U) *See* St. App. 1a-5a.

[9] Hereinafter, "(M)(ii)."

The Board of Immigration Appeals ("BIA") at first remanded the case because of procedural defects. After further proceedings, the IJ denied the Kawashimas' motion to terminate the proceeding and ordered them removed. Pet. App. E, 106a. The BIA affirmed, adopting the IJ's decision. Pet. App. G, 108a.

The Kawashimas timely filed petitions for review in the United States Court of Appeals for the Ninth Circuit. The Kawashimas sought review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen, which were consolidated under 8 U.S.C. § 1252(b)(6).

In a decision filed September 18, 2007, the Ninth Circuit denied Mr. Kawashima's petition, holding that the Kawashimas' convictions under §§ 7206(1) and (2) "necessarily 'involve fraud or deceit'" because the provisions require the Government to prove that the Kawashimas acted "willfully." *Kawashima v. Gonzales*, 503 F.3d 997, 1000 (9th Cir. 2007) ("*Kawashima I*"). Pet. App. D, 87a. The Ninth Circuit held that the language of (M)(i) was clear. *Id.* at 89a. The court also held that the Government was a qualifying "victim" and that the revenue loss in excess of $10,000 satisfied the monetary "loss" requirement of (M)(i). The Ninth Circuit concluded that "because such interpretation does not lead to an absurd or unreasonable result, our inquiry must end." *Id.* at 87a.

As to Mrs. Kawashima, the Court granted the petition because the court was unable to conclude that Mrs. Kawashima's conviction resulted in a loss

to the Government in excess of $10,000. *Id.* at 94a-95a.

The Kawashimas then petitioned the Ninth Circuit for a rehearing, which was granted. The court, in a *per curiam* decision, withdrew its 2007 decision and held that (M)(i) required that the crime of conviction must establish a loss in excess of $10,000 as an element of the crime, which the Kawashimas' convictions did not so establish. *Kawashima v. Mukasey*, 530 F.3d 1111, 1118 (9th Cir. 2008) ("*Kawashima II*"). Pet. App. C, 66a. Accordingly, the Kawashimas were not to be deported.

The Government then filed a petition for rehearing. While the Government's petition for rehearing was pending, the Court granted certiorari in *Nijhawan v. Attorney General*, 523 F.3d 387 (3d Cir. 2008), *cert. granted sub nom. Nijhawan v. Mukasey*, 555 U.S. 1131 (2009). The Government then requested the Ninth Circuit to stay any consideration of its petition for rehearing until the Court decided *Nijhawan*. The Government's request for a stay was granted. After the Court issued its decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the Ninth Circuit ordered the parties to file supplemental briefs on *Nijhawan*'s impact on the pending Kawashima case.

After receiving supplemental briefs, the Ninth Circuit withdrew its prior decision in *Kawashima II* and held that the tax convictions of Mr. and Mrs. Kawashima were aggravated felonies, subject, in Mrs. Kawashima's case, to an evidence review to

determine that the loss to the Government was actually in excess of $10,000. *Kawashima v. Holder*, 593 F.3d 979, 981, 985-87, 989 (9th Cir. 2010) (*"Kawashima III"*). Pet. App. B, 33a, 43a-46a, 52a. The Ninth Circuit held that "according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which the tax loss to the government exceeds $10,000 constitute aggravated felonies under subsection (M)(i)." *Id.* at 39a (*citing Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008), *cert. denied sub nom. Arguelles-Olivares v. Holder*, 130 S. Ct. 736 (2009)).

The Court in *Nijhawan* held that the crime of conviction under 8 U.S.C. § 1101(a)(43) does not require the body deciding guilt to find a loss of $10,000 as an element of the crime. *Nijhawan*, 129 S. Ct. at 2298. It is rather a "particular circumstance" which can be determined by the evidence in the case. *Id.*

Accordingly, Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's removal order was denied. Pet. App. B, 52a. With respect to Mrs. Kawashima, the Ninth Circuit remanded her case to the BIA "so that it may determine in light of the Supreme Court's holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the government as a result of Mrs. Kawashima's crime." *Id.* at 49a.

The Kawashimas timely filed a petition for rehearing and rehearing *en banc* with the Ninth Circuit, which was denied on August 4, 2010. The Ninth Circuit ordered that its opinion in *Kawashima*

III be withdrawn, and the Court filed a new opinion contemporaneously with the filing of the Order denying rehearing. *Kawashima v. Holder*, 615 F.3d 1043, 1046 (9th Cir. 2010) ("*Kawashima IV*"). Pet. App. A, 2a.

The Ninth Circuit, for the most part, reiterated its holding in *Kawashima I* and *Kawashima III*, that the crimes of which the Kawashimas were convicted were aggravated felonies under (M)(i). *Id.* at 23a-24a. The court remanded Mrs. Kawashima's case to the BIA to determine whether the evidence in the record was sufficient to establish the total loss to the Government as a result of Mrs. Kawashima's crime. *Id.* at 27a.

Three judges of the Ninth Circuit dissented from the denial of the rehearing *en banc* in an opinion by Judge Susan Graber. *Id.* at 3a-12a.

SUMMARY OF ARGUMENT

(M)(i) and (M)(ii) of the aggravated felony statute, 8 U.S.C. § 1101(a)(43), must be read together as covering two distinct categories of crimes: fraud or deceit crimes on one hand, and revenue/tax crimes on the other hand. (M)(i) deals with "loss to victim(s);" (M)(ii) deals with "revenue loss" to the Government.

As a matter of statutory construction, different words in parallel provisions of the same statute were inserted by Congress for a purpose. *See Lopez v. Gonzales*, 549 U.S. 47, 55 (2006); *Russello v. United States*, 464 U.S. 16, 23 (1983). Revenue losses suffered by the Government as a result of tax crimes were not intended to be covered by Congress in (M)(i), which instead covers "fraud or deceit" crimes resulting in "losses to victims."

The Court has consistently ruled that effect should be given to all provisions of a statute so that no part of the statute will be superfluous. *See, e.g., Corley v. United States*, 556 U.S. 303, 129 S. Ct. 1558, 1560 (2009); *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Tax evasion, among some other tax crimes, has fraud as an element of the crime. (M)(ii), involving tax evasion, would be rendered superfluous if tax evasion also fell within (M)(i).

Giving effect to both (M)(i) and (M)(ii) and rendering no provision superfluous leads inexorably to the conclusion that tax crimes are not covered by

(M)(i), and are only covered in (M)(ii). The canon of statutory construction that the specific limits and controls the general also coalesces with other canons to compel the conclusion that tax evasion is the only tax crime which Congress designated as an aggravated felony under (M).

The Sentencing Commission, established in 1987, works closely with Congress and was delegated by Congress to designate categories of offenses for sentencing purposes. The Commission's separate treatment of fraud or deceit crimes and tax crimes, in coordination with Congress, lends weight to Petitioners' contention that tax crimes were not intended by Congress to be covered in (M)(i) as "offenses involving fraud or deceit" when Congress expanded the definition of "aggravated felony" in 1994.

Applying the canons of statutory construction and considering the categories of crimes designated by the Sentencing Commission, it must be concluded that tax crimes are not covered by (M)(i). Accordingly, the Kawashimas' tax crimes of conviction are not aggravated felonies under (M)(i).

Even if some tax crimes were intended to be covered by (M)(i), the Kawashimas' tax crimes of conviction did not contain fraud or deceit as an element and would not, therefore, be aggravated felonies under (M)(i). The Ninth Circuit was wrong in holding that because the Kawashimas acted "willfully," their convictions necessarily involved "fraud or deceit." "Willfully" is an element of all tax crimes covered in 26 U.S.C. §§ 7201-7207. *See*

United States v. Bishop, 412 U.S. 346, 361 (1973). Willfulness constitutes a voluntary, intentional violation of a known legal duty. *See United States v. Pomponio*, 429 U.S. 10, 12 (1976). Proving willfulness does not establish fraud. *See Pomponio*, 429 U.S. at 12; *Bishop*, 412 U.S. at 361; *Spies v. United States*, 317 U.S. 492, 498 (1943).

Sections 7206(1) and (2), of which the Kawashimas were convicted, are perjury statutes in which "fraud or deceit" are not essential elements. *See Wright v. Comm'r*, 84 T.C. 636, 643 (1985) (acquiesced to by the Commissioner of Internal Revenue).

The crime of conviction under § 7206(1) is complete upon proof that the taxpayer willfully and intentionally made a false statement on his return under the penalty of perjury. Section 7206(2) only requires the showing of "aiding or assisting" in the material falsity. Fraud or deceit is not a necessary element of a crime under either §§ 7206(1) or (2), and the Government did not need to prove a fraudulent intent or an intent to deceive to obtain convictions under § 7206. The Kawashimas' crimes, therefore, are not covered by (M)(i).

If, nevertheless, the Court concludes that (M) is ambiguous, the Court must apply the rule of lenity and construe the statute in favor of the Kawashimas. *See INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Because (M) is an immigration statute that has criminal law applications, the criminal rule of lenity also applies. *See Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577,

2589 (2010); *Leocal*, 543 U.S. at 12 n.8. Due Process and fair notice require clarity and certainty about what the law requires and forbids. Driven by the Court's constitutional adherence to due process, the rule of lenity has evolved and the Court has applied the rule in a number of immigration cases because it is fundamentally unfair that an immigrant suffer the catastrophic sanction of deportation and banishment grounded on an unclear and ambiguous statute. If the Court does not find that the text of the statute clearly excludes convictions under §§ 7206(1) and (2), the Court must at the very least conclude that (M) is an unclear and ambiguous statute and apply the rule of lenity in favor of the Kawashimas.

For these reasons, the Court should reverse the decision of the Ninth Circuit in this case and remand the case with instructions to set aside the orders of deportation.

ARGUMENT

I.

Applying Time-Honored Canons of Statutory Construction, the Kawashimas' Crimes of Conviction Are Not Offenses "Involving Fraud or Deceit" Under 8 U.S.C. § 1101(a)(43)(M)(i).

Any alien who is convicted of an aggravated felony at any time after admission is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). Subparagraphs (M)(i) and (M)(ii) are among the crimes listed as "aggravated felonies." *See* 8 U.S.C. § 1101(a)(43)(M). The plain rationale behind this legislation and the term "aggravated felony" is that aliens who commit serious crimes should not be permitted to stay in the United States. However, the Kawashimas did not plead guilty to, and were not convicted of, aggravated felonies as defined by 8 U.S.C. § 1101(a)(43), specifically § 1101(a)(43)(M)(i).

As a matter of law, applying the time-honored canons of statutory construction and fundamental notions of due process and fair notice, the Kawashimas should not be deported from this country and forced to leave their home and restaurant business in California, where they have lived, worked, and raised a family for over the past 25 years.

As the Court stated in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*:

> The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent [citing cases]. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. 837, 843 n.9 (1984); *accord Cardoza-Fonseca,* 480 U.S. at 447-448.

In embarking upon the construction of a statute, the starting point is the language employed by Congress. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). In this case, (M)(i) addresses "loss" to a "victim" as a result of an offense involving fraud or deceit. On the other hand, (M)(ii) addresses "revenue loss" to the Government. (M)(ii) specifically deals with tax evasion which is tax fraud. If Congress intended that tax fraud be covered in (M)(i), there was no need to enact (M)(ii). (M)(ii) would be superfluous. Similarly, if Congress intended other tax crimes to be "aggravated felonies," Congress could easily have so provided in (M)(ii), rather than singling out tax evasion as an aggravated felony. *See Kucana v. Holder*, 130 S. Ct. 827, 838 (2010).

A. Where Congress Uses Particular Language in One Section of a Statute and Omits it in Another Section, it is Generally Presumed that There Was Reason for the Difference in the Language Used. Congress' Use of "Revenue Loss" in (M)(ii) Indicates that Congress Intended that Violations of Revenue Loss Statutes § 7201 and § 7206 Were Not To Be Covered by (M)(i).

As the Court stated in *Russello v. United States*:

> [Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

464 U.S. 16, 23 (1983) (quotation omitted); *accord Kucana v. Holder*, 130 S. Ct. 827, 838 (2010); *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009); *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006); *Custis v. United States*, 511 U.S. 485, 492 (1994); *Cardoza-Fonseca*, 480 U.S. at 432. In this case, different words in separate provisions of the same statute were inserted for a purpose: loss to a victim or victims in

(M)(i) *versus* revenue loss to the Government in (M)(ii).[10]

The express language of (M)(i) and (M)(ii) is indicative of two separate categories or classifications of crimes. Subsection (M)(i) addresses crimes based upon fraud or deceit in which victims suffer a loss in excess of $10,000. Subsection (M)(ii) deals with tax crimes and does not describe the Government as a "victim." Congress carefully chose to describe the crime of tax evasion as one involving a revenue loss to the Government.

The Ninth Circuit failed to recognize that Congress established two separate classifications of crimes in using the phrase "revenue loss to the Government" in (M)(ii), as distinct from a "loss to victims" in fraud or deceit crimes. The Court in *Nijhawan v. Holder* recognized the difference between (M)(i) and (M)(ii), noting that (M)(i) dealt with fraud or deceit causes of action such as those found under state law. 129 S. Ct. 2294, 2302 (2009). In contrast, the Court referred to (M)(ii) as the "internal revenue provision." *Id.* at 2301.

Congress made a distinction between "loss" and "revenue loss" in (M)(i) and (M)(ii) respectively. The Court should conclude that the distinction made by Congress was intentional and purposeful:

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[10] The use of the word "revenue" is specific to taxes. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 397, 399 (1990) (holding that "revenue bills are those that levy *taxes* in the strict sense of the word . . . .") (emphasis added).

revenue losses suffered by the Government as a result of violations of § 7201 or § 7206 were not intended to be covered by (M)(i). *Cf. Russello*, 464 U.S. at 23.

B. Consistent with the Rule Against Superfluities, if Tax Crimes Involving Fraud or Deceit Were Intended to be Covered in (M)(i), There Would be no Reason for Congress to Enact (M)(ii) in 8 U.S.C. § 1101(a)(43).

The Court has repeatedly held as one of its most basic canons of construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley*, 129 S. Ct. at 1566 (*quoting Hibbs*, 542 U.S. at 101).

In *Corley*, the Court recognized that reading one section of a statute as if another parallel section did not exist, as the Ninth Circuit did in this case, violates the cardinal rule of construction that a statute must be read as a whole. *See Corley*, 129 S. Ct. at 1567 n.5. As Professor Singer has written:

> It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. . . . No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will

> give force to preserve all the words of the statute.

J.D. Shambie Singer, *Statutes and Statutory Construction* § 46.6 (7th ed. 2007) (quotations and citations omitted).

The Court applied these principles in interpreting parallel provisions of a statute in *Leocal v. Ashcroft,* where the Court held:

> Congress' separate listing of the DUI – causing injury offense from the definition of 'crime of violence' in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave §101(h)(3) practically devoid of significance. As we must give effect to every word of a statute wherever possible, see *Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001), the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses.

543 U.S. 1, 12 (2004).

Ignoring this bedrock principle of statutory construction, the Ninth Circuit focused solely on (M)(i), as if (M)(ii), a parallel provision, did not exist.

As Judge Graber observed in her dissent in *Kawashima IV*, ignoring a parallel provision as if it does not exist is simply contrary to basic principles of statutory construction. Pet. App. A, 6a-8a.

If tax evasion involved fraud or deceit under § 7201 and was covered by (M)(i), (M)(ii) would be rendered superfluous. Justice Alito (then Judge) advanced the proposition in *Ki Se Lee v. Ashcroft* that Congress may have added (M)(ii) specifically to cover tax evasion in violation of § 7201, because that tax crime *may not* be covered in (M)(i). 368 F.3d 218, 227 (3d Cir. 2004) (Alito, J., dissenting).

Respectfully, tax evasion involves fraud at its core. 26 U.S.C. § 7201 and 26 U.S.C. § 6663, the civil fraud penalty statute, are viewed as identical: that an attempt to evade tax is fraud. *See Gray v. Comm'r*, 708 F.2d 243, 246 (6th Cir. 1983) ("The elements of criminal tax evasion and civil tax fraud are identical."); *Hicks Co., Inc. v. Comm'r*, 470 F.2d 87, 90 (1st Cir. 1972); *Moore v. United States*, 360 F.2d 353, 356 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967); *see also* Kenneth E. North, *Criminal Tax Fraud* § 25.8, 25.11 (3d ed. 1998).

In *Spies v. United States*, the Court stated that tax evasion is "the capstone of a system of sanctions which . . . were calculated to induce prompt and forthright fulfillment of every duty under the income tax law . . . ." 317 U.S. 492, 497 (1943). Tax evasion involves willful attempts to defeat and evade a tax, commonly referred to as "tax fraud." *See Black's Law Dictionary* (9th ed. 2009).

The Court observed in *Spies:*

> If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without an intent to defraud, five percent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the additional is 50 percent thereof.

Spies, 317 U.S. at 496-497.

The Court in *Spies* distinguished the predecessor of § 7201 (§ 145(b)) from misdemeanor revenue offenses. "Willful" applies to all revenue offenses, but § 145(b) (now § 7201) is the "climax of this variety of sanctions . . . the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax." *Spies*, 317 U.S. at 497.

The only difference between § 7201 and the civil fraud penalty statute, § 6663, is the burden of proof. *See id.* at 495. In fact, at the time of *Spies*, the civil tax fraud statute that imposed a fraud penalty used the same term: "evade." *See* Internal Revenue Code of 1939 § 239(b) (current version at 26 U.S.C. § 6663) ("Fraud. – If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2)."). For this reason, a conviction of tax

evasion under § 7201 collaterally estops the taxpayer from contesting the civil fraud penalty. *See Blohm v. Comm'r*, 994 F.2d 1542, 1554 (11th Cir. 1993); *Gray*, 708 F.2d at 246; *Moore*, 360 F.2d at 355.

It is illogical to conclude that convictions under § 7201 involving an attempt to evade (*de facto* fraud) may not be covered in (M)(i), but convictions under §§ 7206(1) and (2), which do not have fraud or deceit as an element of the crime,[11] are covered in (M)(i). For (M)(ii) to have any effect and not be superfluous, Congress must have intended that M(ii) covers *the only* tax offense which is an aggravated felony, namely tax evasion under § 7201 under (M).

The Ninth Circuit recognized that its construction of (M)(i) "could have" rendered (M)(ii) superfluous but speculated, without any basis at all, that it was *conceivable* that Congress *intended* a superfluous provision, in disregard of long established canons of statutory construction. *Kawashima IV*, Pet. App. A, 19a-20a. The Ninth Circuit's speculation is a baseless exception to the rule that a statute must be read as a whole to guard against a superfluous construction. Judge Paez's dissent in *Abreu-Reyes v. INS* underscores the point:

> [A]s the statute reflects, Congress drew a distinction between tax offenses and other crimes involving fraud and deceit. Congress then targeted only the more egregious act of tax evasion, and only when the loss to

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11 This is discussed in Point II, *infra*.

> the government exceeds $10,000, as sufficiently serious to warrant removal. . . . If Congress intended for tax crimes other than tax evasion to constitute aggravated felonies when the loss to the government exceeds $10,000, it could have easily defined an aggravated felony in 8 U.S.C. § 1101(a)(43)(M)(ii) as any "tax offense in which the revenue loss to the Government exceeds $10,000" or identified each relevant section of Title 26.

292 F.3d 1029, 1037-38 (9th Cir. 2002) (citations omitted) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966 (2003).

The tax crimes of which the Kawashimas were convicted, violations of 26 U.S.C. §§ 7206(1) and (2), are lesser tax crimes than tax evasion. Section 7206(1) is essentially a tax perjury statute. *See Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966) ("The statute [§ 7206(1)] here involved is a perjury statute."); *see also Mertens Law of Federal Income Tax* § 55A:17 (2008); Darrell McGowen et al., *Criminal Tax Fraud* § 16.55 (2d ed. 1994).

Accordingly, the Ninth Circuit's reasoning defies logic: the greater offense (tax evasion) does not necessarily involve "fraud or deceit," but the lesser offense "necessarily" does.

Giving effect to both (M)(i) and (M)(ii), as the Third Circuit held in *Ki Se Lee* and as Judge Graber

articulated in this case, supports the conclusion that (M)(ii) deals with the only tax crime that is an "aggravated felony," namely tax evasion. As such, the Kawashimas should not be deported as a result of their convictions.

C. The Specific Inclusion of Tax Evasion as an Aggravated Felony in (M)(ii) Limits the Breadth of General Crimes of "Fraud or Deceit" Described in (M)(i).

A corollary to the canon that a statute should not be construed to make any provision superfluous is the rule that general words followed by specific words limit the breadth of the general words.

> The doctrine of *ejusdem generis* is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute and other legal instruments can be given effect, all parts of a statute can be construed together and no words will be superfluous.

Singer, *supra*, § 47.17 (citations omitted).

The Court's decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981), illustrates this principle. In that case, the Court upheld the IRS denial of a 26 U.S.C. § 501(c)(3) exemption application on the basis of § 501(e), stating that:

> It is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned, both in fact being parts [of the same section].

HCSC-Laundry, 450 U.S. at 6.

In this case, (M)(ii) limits (M)(i). Offenses involving "revenue losses," like § 7201 in (M)(ii), are not included in "losses" to victims in (M)(i).

The different descriptions of "loss" in these parallel provisions, as well as the rule of statutory construction that the "specific governs the general," support the conclusion that tax crimes involving a revenue loss to the Government are not within (M)(i), but are covered in (M)(ii).

The canons of statutory construction dictate that tax crimes (whether a violation of § 7201 or § 7206) are not included in (M)(i) and, therefore, the Kawashimas' tax crimes of conviction are not included in (M)(i).

D. The Sentencing Guidelines Distinguishing Crimes "Involving Fraud or Deceit" from Tax Crimes Support the Proposition that Tax Crimes Were Not Considered by Congress To Be Covered by (M)(i).

Congress made aggravated felonies deportable offenses for the first time through the passage of the Anti-Drug Abuse Act of 1988, which amended the Immigration and Nationality Act. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-44, 102 Stat. 4181, 4469-70 (1988) (codified as amended in scattered sections of 8 U.S.C.). The Anti-Drug Abuse Act defined an aggravated felony as murder, drug trafficking, trafficking in firearms or other destructive devices, or attempting or conspiring to commit these crimes. *Id.*

In 1990, Congress broadened the definition of an aggravated felony to include money laundering offenses and "any crime of violence," other than purely political offenses, punishable by at least five years of imprisonment. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 501, 104 Stat. 4978, 5048 (1990) (codified as amended in scattered sections of 8 U.S.C.). Congress, through the Immigration and Nationality Technical Corrections Act of 1994, increased the number of "aggravated felonies," including those referred to in subsection (M). *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416 § 222, 108 Stat. 4305, 4320 (1994) (codified as amended in scattered sections of 8 U.S.C.).

The expansion of the definition of an aggravated felony to include (M)(i) and (M)(ii) came about through an amendment of Senator Alan Simpson of Wyoming to H.R. 783 on October 6, 1994. 140 Cong. Rec. S14400 (daily ed. Oct. 6, 1994) (statement of Sen. Wendell Ford). Senator Simpson's amendment was passed without debate in the Senate and the House. 140 Cong. Rec. S14400 (daily ed. Oct. 6, 1994); 140 Cong. Rec. H11291 (daily ed. Oct. 7, 1994).

The Simpson Amendment's expansion of the definition of "aggravated felonies" to include (M)(i) and (M)(ii) followed previous unsuccessful efforts in the House to pass similar bills. *See* Criminal Aliens Deportation Act of 1993, H.R. 1459, 103d Cong. (1993); Immigration Stabilization Act of 1993, H.R. 3320, 103d Cong. (1993).

Most "aggravated felonies" under 8 U.S.C. § 1101(a)(43) are specific in their description of the particular crime, by reference to a specific penal statute, for example, a violation of 18 U.S.C. §§ 875-877, 1202 (*see* 8 U.S.C. § 1101(a)(43)(H)), 18 U.S.C. §§ 2251, 2251A, 2252 (*see* 8 U.S.C. § 1101(a)(43)(I)), or, as in the case of (M)(ii), a violation of 26 U.S.C. § 7201 (tax evasion). Such is not the case in respect to (M)(i): an "offense involving fraud or deceit in which the loss to the victims or victims exceeds $10,000."

There is nothing in the legislative history that Petitioners could uncover that might shed light on what crimes Congress intended to be covered by (M)(i). However, a review of the Sentencing

Guidelines promulgated by the Sentencing Commission prior to 1994, when (M) was enacted into law, indicates that it is likely that the language of (M)(i) and (M)(ii) was taken from the Sentencing Guidelines by Senator Simpson and the sponsors of previous House Bills. It is also likely that for tax crimes, Congress reviewed Title 26 to determine what tax crimes were serious enough to warrant inclusion in the definition of aggravated felony. Congress decided upon firearms offenses, covered in 8 U.S.C. § 1101(a)(43)(E)(iii), and tax evasion, covered in (M)(ii).

Congress delegated to the Commission the authority to establish "categories of offenses" for which the Commission established a sentencing range. *See* 28 U.S.C. § 994(c); *see also Mistretta v. United States*, 488 U.S. 361, 374 (1989). Among these "categories of offenses," the Commission listed "[o]ffenses involving fraud or deceit" to which the sentencing guidelines were applied. *See U.S. Sentencing Guidelines Manual* §§ 2F1.1, 2F1.2 (2000) [hereinafter "U.S.S.G.M."]; Thomas W. Hutchinson et al., *Federal Sentencing Law and Practice* 580-649 (2011).[12]

The category of crimes listed by the Commission in 1987 predated the Simpson Amendment to the Immigration and Nationality Act, which included for the first time in the definition of

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[12] The heading to Part F was "Offenses Involving Fraud or Deceit" effective November 1, 1987.

"aggravated felonies" offenses involving fraud or deceit.[13]

The Sentencing Guidelines are closely monitored by Congress. The Commission was to report to Congress two years after the initial set of sentencing guidelines and annually thereafter. 28 U.S.C. §§ 994(r), (w). Between 1988 and 2010, in addition to the directives to the Commission set forth in the Sentencing Reform Act, 28 U.S.C. §§ 991, 994, Congress continuously influenced sentencing policy by issuing over one hundred formal statutory directives.[14] *See also* 28 U.S.C. § 994 (History; Ancillary Laws and Directives and 2011 Pocket Parts).

In line with (M)(i) and (M)(ii), the Commission established a sentencing guideline for federal offenses involving fraud or deceit and a separate sentencing guideline for tax offenses. It is hardly coincidental that Congress used the precise language found in Part F of the Sentencing Guidelines ("fraud or deceit") in listing the offenses in (M)(i) as aggravated felonies.[15]

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[13] The Court in *Nijhawan* dealt with state fraud or deceit crimes. *See Nijhawan*, 129 S. Ct. at 2302.

[14] The Commission has functioned like the "junior varsity" Congress. *Mistretta*, 488 U.S. at 427 (Scalia J., dissenting).

[15] Similarly, in 1976, the United States Parole Commission was established with duties of promulgating explicit guidelines for parole decision-making. *See* Parole Commission and Reorganization Act, Pub.L. No. 94-233. 9(

Tax offenses, on the other hand, are covered in Part T of the Guidelines. U.S.S.G.M. § 2T1.1. These were the sentencing guidelines to which the Government stipulated in the plea agreements as applicable to the Kawashimas. Pet. App. I, 120a; Pet. App. J, 130a ("[T]he applicable guideline is section 2T1.3 of the Sentencing Guidelines . . . ."). The guideline stipulated to was the tax offense guideline, not the fraud guideline. In Part T, tax evasion (26 U.S.C. § 7201) and filing a false statement (26 U.S.C. § 7206) are addressed with "tax loss" (revenue loss) as the determinant of the sentence. *See* Hutchinson et al., *supra,* at 1025-65.

Critically, nowhere in Part T (for tax crimes) is the Government identified as a "victim." The Commentary to the Guidelines no doubt reflected the Court's holdings in *Spies* and *Bishop*, "that criminal tax prosecutions serve to punish the violator and protect respect for the tax laws" and the Government is not characterized as "a victim." U.S.S.G.M., ch. 2, pt. T, introductory cmt.; *see also* Hutchinson et al., *supra,* at 1026. The loss is described by the Commission as a "tax loss" (a synonym for revenue loss), as distinct from a "loss to a victim." In Part F, "loss" and "victim" are frequently used and "victim" is characterized as referring "to the person or entity

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Stat. 219 (1976). Those guidelines placed offenses into different categories. Fraud offenses were classified separately from "Offenses Involving Revenue" which encompassed "Internal Revenue Offenses" and "Customs Offenses." 28 C.F.R. § 2.20(b).

from which the funds are to come directly." U.S.S.G.M. § 2F1.1.

Where the Government has been defrauded under federal entitlement programs like federal employee compensation benefits, *United States v. Dawkins*, 202 F.3d 711 (4th Cir. 2000), or Medicare, *United States v. Hoffman*, 568 F.3d 1335 (11th Cir. 2009), or Federal Emergency Management Agency (FEMA) programs, *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009), or a theft from a federal bank occurs, *Balogun v. U.S. Attorney General*, 425 F.3d 1356 (11th Cir. 2005), the Government is properly regarded as a "victim." Not in tax cases under the Sentencing Guidelines, however, where the loss is a "tax loss" or "revenue loss" to the Government, as stated in (M)(ii).[16]

The separate treatment of federal offenses involving fraud or deceit and tax crimes by the

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[16] The Sentencing Court determines the applicable offense guideline section for the offense of conviction. *United States v. Lewis*, 161 Fed. App'x 322, 323 (4th Cir. 2006). In this case, both the Sentencing Court and the Government agreed that the Tax Section governed the Kawashima's crimes of conviction. In *United States v. Vucko*, the court held that the fraud and tax convictions were separate and could not be grouped. 473 F.3d 773, 781 (7th Cir. 2007). *See also* U.S. Sentencing Commission, Questions Most Frequently Asked About, Appendix E, Volume VI (December 1, 1992), Question 33, at 1028. ("Can tax evasion (§ 2T1.1) be grouped with fraud (§ 2F1.1) pursuant to § 3D1.2(d)? Answer: No. . . . The fraud table and the tax table are driven by different guideline definitions of 'loss.' Thus, tax evasion and fraud . . . may not be grouped according to rule (d).")

Commission in coordination with Congress lends weight to Petitioners' contention that tax crimes were not intended by Congress to be covered in (M)(i) as an "offense involving fraud or deceit." *See Valansi v. Ashcroft*, 278 F.3d 203, 213 (3d Cir. 2002) (noting that a court may look to Sentencing Guidelines to determine Congressional intent).

Applying the canons of statutory construction and the language employed by Congress, Petitioners submit that tax crimes are not, and were not intended to be, covered by (M)(i). Accordingly, the tax crimes committed by the Kawashimas are not aggravated felonies under (M)(i). The only tax crime which Congress made an aggravated felony in (M) was tax evasion in violation of 26 U.S.C. § 7201, which was not a crime to which the Kawashimas pled guilty.

II.

Even if Tax Crimes Were Intended To Be Covered by (M)(i), the Kawashimas' Crimes of Conviction Did Not Contain Fraud or Deceit as an Element of the Crimes of Conviction and, Accordingly, Are Not Aggravated Felonies Under (M)(i).

Even assuming *some* tax crimes are covered by (M)(i), the tax crimes of which the Kawashimas were convicted under 26 U.S.C. §§ 7206(1) and (2) are not "aggravated felonies." As such, the Kawashimas' crimes of conviction would not fall within (M)(i).

In *Nijhawan v. Holder*, the Court held that for purposes of (M)(i), the $10,000 threshold *was not* an element of the crime of which Nijhawan was convicted. 129 S. Ct. 2294, 2302 (2009). The Court recognized that the threshold amount is not an element of the crime in most state fraud or deceit statutes. *Id.* at 2302. Following the reasoning of the Court in *Nijhawan*, fraud or deceit, unlike the $10,000 loss threshold, must be an element of the crime of conviction to render it a crime of "fraud or deceit" under (M)(i).

In the same vein, the Board of Immigration Appeals in 2007 held that "it is the elements of the crime an alien is actually convicted of, not the crime he or she may have committed, that is determinative of deportability." *In re Babaisakov*, 24 I. & N. Dec. 306, 312 (BIA 2007) (*citing In re Pichardo*, 21 I. & N. Dec. 330, 335 (BIA 1996)).

The petitioner in *Nijhawan* was convicted of conspiracy to commit wire *fraud,* bank *fraud, and* mail *fraud*. Fraud, obviously, was an element of the crimes of conviction and, therefore, the crimes plainly fell within (M)(i). Similarly, in several recent decisions, the Court has held that the elements of the crime of conviction determine whether the crime is an "aggravated felony." For example, in *Carachuri-Rosendo v. Holder*, the Court ruled that the offense which defendant was convicted of, not what he could have been convicted of, controls whether the crime of conviction is an aggravated felony. 130 S. Ct. 2577, 2579 (2010). In that case, the Court held that it is the "record of conviction" and "the conduct actually punished by the state

offense" that controls. *Id.* at 2588; *see also id.* at 2591 (Scalia, J., concurring) ("A defendant is not 'convicted' of sentencing factors, but only of the elements of the crime charged in the indictment.").

In *Leocal v. Ashcroft*, the Court held that, in determining whether the crime of violence was there involved, it must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." 543 U.S. 1, 7 (2004); *see also Taylor v. United States*, 495 U.S. 575, 599 (1990) ("[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) ("[A] state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law.").

The Kawashimas' crimes of conviction did not require, as elements of their respective offenses, a finding of fraud or deceit, and the Kawashimas did not admit to "fraud or deceit" in their plea agreements.[17] *See* Pet. App. I, 115a; Pet. App. J,

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[17] The Plea Agreement of Mrs. Kawashima, filed August 11, 1997, has been reproduced on pages 125a-134a of Petitioners' Appendix to the Petition for Writ of Certiorari. The Solicitor General has pointed out that the plea agreement of Mrs. Kawashima was not part of the record before the Ninth Circuit, unlike the plea agreement of Mr. Kawashima, which is in the record. *See also Kawashima I*,

130a. The Kawashimas' crimes of conviction do not fall within the ambit of (M)(i). Section 7206(1) is a tax perjury statute, not a "fraud or deceit" statute.[18] *See Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966); McGowen et al., *supra*, § 16.55 ("the so-called tax perjury statute is codified in § 7206(1) of the Internal Revenue Code"); *Mertens Law of*

Pet. App 93a. Petitioners have no knowledge as to why it was not included in the administrative record before the BIA. However, the Court can take judicial notice of the court record filed in the U.S. District Court for the Central District of California, where judgment of conviction was entered on the plea agreement of Mrs. Kawashima.

The Court may take judicial notice of adjudicative facts such as federal court records and proceedings. *Moore's Federal Practice* § 526.02 (3d ed. 2011); *Federal Procedure, Lawyers Edition* §§ 33.60, 33.63, 33.66 (2010). The test under Rule 201 of the Federal Rules of Evidence is whether an adjudicative fact is "capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also* Charles A. Wright et al., *Federal Practice and Procedure: Evidence* § 5106.4 at 240-243 (2d ed. 2005).

Mrs. Kawashima's plea agreement is relevant because a defendant may be convicted of § 7206(2) by assisting in the preparation of a return "which is fraudulent *or* is false as to any material matter." 26 U.S.C. § 7206(2) (emphasis added). Mrs. Kawashima pled guilty and admitted to assisting in preparation of a false statement, but not to fraud.

[18] It should be noted that 8 U.S.C. § 1101(a)(43)(S), which is the aggravated felony statute that covers crimes "relating to perjury," requires that the term of imprisonment to be "at least one year" to qualify the immigrant-convict for removal. The Kawashimas' sentences were four months.

Federal Income Tax § 55A:17. Fraud or deceit is not an element of a crime in violation of § 7206(1) or (2).

The Ninth Circuit erroneously found that because Mr. Kawashima acted "willfully" with specific intent to violate the law, his conviction under § 7206(1) "necessarily involved fraud or deceit." *See Kawashima I*, Pet. App. D, 87a, 92a; *Kawashima IV*, Pet. App. A, 22a (*citing Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) (Alito, J., dissenting)). Such a holding is contrary to the seminal tax case of *United States v. Bishop*, 412 U.S. 346 (1973). In *Bishop*, this Court held that "willfully" is an element of *all* tax crimes covered in 26 U.S.C. §§ 7201-7207. 412 U.S. at 361. This Court has never said, in *Bishop* or in any other case, that "willfully" equates with fraud and/or deceit. On the contrary, in referring to § 7206(1), the Court reaffirmed its holding in *Bishop*:

> We did not, however, hold that the term [willfully] requires proof of any motive other than an intentional violation of a known legal duty. . . . '[W]illfully' . . . connotes a voluntary, intentional violation of a known legal duty.

United States v. Pomponio, 429 U.S. 10, 12 (1976) (quotation and citation omitted); *see also Cheek v. United States*, 498 U.S. 192, 201 (1991). Proving willfulness is not proving fraud.

Guided in part by the Court's decision in *Bishop*, the Tax Court in *Wright v. Comm'r*, 84 T.C.

636 (1985), and the Ninth Circuit in *Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982), held that fraud is not a necessary element of § 7206(1), a holding in which the Commissioner of Internal Revenue has acquiesced. *See* Commissioner's Acquiescence, 1988-2 C.B. 1, 1988 IRB Lexis 3924. The Ninth Circuit stated in *Considine*:

> The Supreme Court acknowledged in *Bishop* that sections 7201 and 7206(1) each require "willful" perpetration of a different act. 412 U.S. at 360 n.8, 93 S. Ct. at 2017 n.8. The express language of section 7201 requires an intent to avoid tax (a legitimate synonym for fraud). Section 7206 (1) (false return), however, does not require any fraudulent intent. Because §7206(1) does not require a willful attempt to evade tax, a conviction under § 7206(1) without more, does not establish "fraudulent intent."

Considine, 683 F.2d at 1287 (citations omitted); *see also Wagner v. Comm'n*, T.C.M. 1996-355, 1996 Tax Ct. Memo LEXIS 356, at *15 (August 5, 1996) (7206(1) does not require proof of fraudulent intent). The Tax Court in *Wright* then found that a conviction under § 7206(1) does not collaterally estop the taxpayer from disputing fraud, which is a required element of 26 U.S.C. § 6663(b)(1):

> [T]he intent to evade taxes is not an element of the crime charged under

> section 7206(1). Thus, the crime is complete with the knowing, material falsification, and a conviction under section 7206(1) does not establish as a matter of law that the taxpayer violated the legal duty with an intent, or in an attempt, to evade taxes.

Wright, 84 T.C. at 643 (citations omitted); *see also* Laurence Goldfein and Farley P. Katz, *Expanded Application of 7206(1) Includes the Failure to Report Gross Receipts*, 52 J. Tax'n 94 (1980) (discussing the pre-*Considine* analysis of § 7206).

In *Wright*, the Tax Court recognized that § 7201 contained a fraud element in that the taxpayer attempted to evade taxes. *Wright*, 84 T.C. at 642 (citation omitted); *see also Chen v. Comm'r*, T.C.M. 2006-160, 2006 Tax Ct. Memo LEXIS 163, at *8 (August 8, 2006) (*citing Beaver v. Comm'r*, 55 T.C. 85, 92-93 (1970)). Section 7206 serves a different purpose:

> In a criminal action under section 7206(1), the issue actually litigated and necessarily determined is whether the taxpayer voluntarily and intentionally violated his or her known legal duty not to make a false statement as to any material matter on a return. The purpose of section 7206(1) is to facilitate the carrying out of [the IRS's] proper functions by punishing those who intentionally falsify their Federal income tax

> returns and the penalty for such perjury is imposed irrespective of the tax consequences of the falsification.

Wright, 84 T.C. at 643 (citations omitted).[19]

The Government in *Bobb v. Attorney General* (as did the Third Circuit) took the same position as Petitioners in this case: that fraud or deceit must be an element of a crime covered by (M)(i). 458 F.3d 213, 219 (3d Cir. 2006). In the same vein, the Third Circuit in *Nugent v. Ashcroft*, determined that Nugent's theft by deception fell within the purview of (M)(i) *because* it required the state to prove fraud or deceit. 367 F.3d 162, 178 (3d Cir. 2004); *see also Valansi v. Ashcroft*, 278 F.3d 203, 217 (3d Cir. 2002) (finding that the plain meaning of (M)(i) defines an aggravated felony as an offense that has fraud or deceit as at least one required element and ruling that defendant's guilty plea to theft and an intent to injure did not equate to acceptance of guilt as to any fraudulent intent).

Mr. Kawashima pled guilty to "willfully" making a false statement on a corporate tax return, and Mrs. Kawashima pled guilty to "willfully" assisting her husband. Fraud or deceit was not an

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[19] Because § 7206 involves perjury, it is irrelevant whether there is a revenue loss to the Government. *See United States v. Di Varco*, 484 F.2d 670, 672-73 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) (where the correct income was reported but the source of the income was falsely reported).

element of their crimes of conviction. Also, neither Mr. nor Mrs. Kawashima stipulated that that they committed fraud or deceit in their respective plea agreements. *See* Pet. App. I, 120a; Pet. App. J, 130a; *see Braxton v. United States*, 500 U.S. 344, 351 (1991) (finding that defendant's stipulation in plea agreement to assault and use of a firearm did not "specifically establish" another crime, attempt to kill).

As neither fraud nor deceit are elements of a conviction under §§ 7206(1) and (2), the Kawashimas' convictions do not come within (M)(i), *even if* some tax crimes are within (M)(i)'s scope.

III.

If the Court Concludes that 8 U.S.C. § 1101(a)(43)(M) is Ambiguous, the Court, as a Matter of Due Process and Fair Notice, Should Apply the Rule of Lenity and Construe the Statute in Favor of the Kawashimas and Set Aside the Orders of Removal.

If the Court does not find that the text of the statute clearly excludes convictions under §§ 7206(1) and (2), *see* Points I and II *supra*, the Court must at the very least conclude that (M) is an unclear and ambiguous statute. Every Circuit that has ruled on the construction of (M)(i) and (M)(ii) has been divided. *See, e.g., Ki Se Lee*, 368 F.3d at 225 (Alito, J., dissenting); *Arguelles-Olivares v. Mukasey*, 526

F.3d 171, 180 (5th Cir. 2008) (Dennis, J., dissenting); *Abreu-Reyes v. INS*, 292 F.3d 1029, 1034 (9th Cir. 2002) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966 (2003). The division of views on this issue continues in this case in the opinion of Judge Graber (joined by Judges Wardlaw and Paez) dissenting from the denial of the Kawashimas' request for a rehearing *en banc*. *See Kawashima IV*, Pet. App. A, 3a-12a; *cf. INS. v. Errico*, 385 U.S. 214, 218 (1966) (Second and Ninth Circuit split over interpretation of § 241(f) of INA relating to deportation of aliens on ground that alien used fraud to procure entry into the United States suggests that the statute is not clear).

Petitioners argue that any conflict of interpretation should be, upon review, resolved in favor of the Kawashimas. As a matter of due process and fair notice, there should be clarity and certainty about the conduct which mandates deportation and banishment. The conflict of interpretation among and within the Circuits demonstrates uncertainty in the application of (M), which is contrary to the principles of due process and fair notice.

In 1994, Congress dramatically increased the number of aggravated felonies, several of which were vague and uncertain "deportable crimes." Justice Alito noted this fact in his concurring opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring).

In *Padilla*, the Court held that a defendant is denied effective assistance of counsel under the Sixth Amendment if his criminal attorney does not advise

him of the consequence of pleading guilty to an offense where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for [the defendant's] conviction." *Padilla*, 130 S. Ct. at 1483 (citation omitted).

In his concurrence, joined by the Chief Justice, Justice Alito stated:

> [m]ost crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as crimes involving *moral turpitude or aggravated felonies*.

Id. at 1488 (Alito, J., concurring) (quotation omitted) (emphasis in original). Justice Alito further stated that, "determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude [(CIMT)]' is not an easy task." *Id.* (citation omitted).

Justice Alito's solution was that the alien should have counsel to advise him of the possible consequences of pleading guilty to a particular offense. *Id.* at 1494. Respectfully, this solution falls short because, as the Kawashimas' case bears out, even experienced immigration practitioners and U.S. federal judges have been unable to discern with confidence whether, in certain cases, a crime is deportable or not.

The fault does not lie with either practitioners or the courts. It lies with Congress and its lack of precision on a critical matter of exile or banishment. Congress should have specified what crimes call for deportation, as it did in the case of tax evasion in (M)(ii).

> [Deportation] is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime. . . . We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligent definition of deportable conduct.

Jordan v. De George, 341 U.S. 223, 243, 245 (1951) (Jackson, J., Black, J., and Frankfurter, J., dissenting). The lament of the dissenting Justices in *Jordan* resonates today in Justice Scalia's recent dissent in *Sykes v. United States*:

> Fuzzy, leave-the-details-to-be-sorted-out-by the Courts legislation is attractive to the Congressman who wants credit for addressing a national problem, but does not have the time (or perhaps the votes) to grapple with the nitty gritty. In the field of criminal law, at least, it is time to call a halt. I do not think it would be a radical step – indeed, I think it would be highly responsible – to limit [the statute] to the *named* violent crimes.

180 L. Ed. 2d 60, 87 (2011) (Scalia, J., dissenting) (emphasis added).

When one examines the aggravated felony statute, 8 U.S.C. § 1101(a)(43), most of the aggravated felonies listed are tied to specific statutory violations, leaving no uncertainty or ambiguity about whether a crime that has been committed calls for deportation. The Court in *Padilla,* however, recognized that parts of the aggravated felony statute were not succinct, clear and explicit in defining whether a particular crime was a removable offense. *Padilla*, 130 S. Ct. at 1483. (M)(i) is such a subsection.

This Court has time and again ruled that ambiguities in deportation statutes should be construed in favor of the alien. *See, e.g., Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). In *Fong Haw Tan*, this Court rejected an administrative interpretation of a deportation provision and unanimously resolved the ambiguity in the alien's favor, holding, "[w]e resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* at 10 (citation omitted); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (reaffirming rule); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (recognizing the special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien); *Errico*, 385 U.S. at 225 ("We resolve the doubts in favor of [the alien] . . . because deportation is a

drastic measure and at times the equivalent of banishment or exile.").

Although the statute at issue is located in the Immigration and Nationality Act, it has both immigration and criminal law implications (*e.g.*, illegal reentry prosecutions pursuant to 8 U.S.C. § 1326) and, therefore, invokes the criminal rule of lenity. *See Carachuri-Rosendo*, 130 S. Ct. at 2589; *Leocal*, 543 U.S. at 12 n.8.

The rule of lenity is to be applied "when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). The important principle underlying the rule of lenity is that fair warning and due notice should be given about a law and what the law requires, in language an ordinary person can understand. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010); *St. Cyr*, 533 U.S. at 321; *United States v. Bass*, 404 U.S. 336, 348 (1971); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). Like the "void for vagueness" doctrine, the rule of lenity arises from the Due Process Clause of the Constitution. The essential purpose of the doctrine is to warn individuals of the consequences of their conduct. *See Williams v. United States*, 341 U.S. 97, 100 (1951) ("Criminal statutes must have an ascertainable standard of guilt or they fall for vagueness.").

Where there is uncertainty in deportation statutes, especially those that have criminal law applications, due process and fair notice demand that the statute be construed in favor of the immigrant.

Thus, if the Court concludes that (M) is ambiguous, it should apply the rule of lenity and find that the Kawashimas were not convicted of aggravated felonies and, therefore, should not be deported.

CONCLUSION

The decision of the Ninth Circuit should be reversed and remanded with instructions to set aside the Kawashimas' Orders of Deportation.

August 5, 2011

Respectfully submitted,

Thomas J. Whalen*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin &
Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
* *Counsel of Record*

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

STATUTORY APPENDIX

8 U.S.C. § 1101(a)(43)

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924 (c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—
(i) section 842 (h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
(ii) section 922 (g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18 (relating to firearms offenses); or
(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—
(i) relates to the owning, controlling, managing, or supervising of a prostitution business;
(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—
(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;
(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or
(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—
(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324 (a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325 (a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense
(i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and
(ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

26 U.S.C. § 7201
Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206
Fraud and false statements

Any person who –

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

RESPONDENT'S BRIEF

No. 10-577

In the Supreme Court of the United States

AKIO KAWASHIMA AND FUSAKO KAWASHIMA,
PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 8 U.S.C. 1101(a)(43)(M), the term "aggravated felony" is defined to include an offense that

> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The question presented is as follows:

Whether petitioners' convictions for filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. 7206(1) and (2) are aggravated felonies under 8 U.S.C. 1101(a)(43)(M)(i), rendering them removable.

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In the Supreme Court of the United States

No. 10-577

AKIO KAWASHIMA AND FUSAKO KAWASHIMA,
PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 615 F.3d 1043. Prior opinions of the court of appeals (Pet. App. 32a-52a, 53a-82a, and 83a-100a) are reported at 593 F.3d 979, 530 F.3d 1111, and 503 F.3d 997, respectively. The decisions of the immigration judge (A.R. 47-48, Pet. App. 101a-106a, 107a) and of the Board of Immigration Appeals (Pet. App. 108a, A.R. 165, Supp. A.R. 2-3) are unreported.[1]

[1] Petitioners jointly filed two separate petitions for review in the court of appeals. "A.R." refers to the administrative record filed in 9th Cir. No. 04-74313 (pertaining to the Board's August 16, 2004 decisions affirming orders that petitioners be removed). "Supp. A.R." refers to the administrative record filed in 9th Cir. No. 05-74408 (pertaining to the Board's June 30, 2005 denial of a motion to reopen proceedings).

JURISDICTION

The order of the court of appeals was entered on August 4, 2010, and a petition for rehearing was denied on the same day (Pet. App. 2a). The petition for a writ of certiorari was filed on November 1, 2010, and granted on May 23, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. In 1988, Congress first provided that an alien who has been convicted of an "aggravated felony" is deportable from the United States. At that time, Congress defined the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to include only murder, certain drug- and firearms-trafficking offenses as defined in the federal criminal code, and "any attempt or conspiracy to commit" such crimes. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-7344, 102 Stat. 4469-4470; see 8 U.S.C. 1101(a)(43) and 1251(a)(4)(B) (1988). Since then, Congress has expanded the INA's definition of "aggravated felony" several times.

In 1990, Congress expanded the definition by adding "any offense described in section 1956 of title 18 * * * (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of title 18 * * *, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years."

Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 5048; see 8 U.S.C. 1101(a)(43) (Supp. II 1990).

In the Immigration and Nationality Technical Corrections Act of 1994 (ITCA), Pub. L. No. 103-416, 108 Stat. 4305, Congress revamped the structure of 8 U.S.C. 1101(a)(43) by listing the different aggravated felonies in separate subparagraphs. It also added several new offenses, including the initial version of the one at issue in this case:

> (M) an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000.

8 U.S.C. 1101(a)(43)(M) (1994); see ITCA § 222(a), 108 Stat. 4322.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress amended Subparagraph (M) by reducing the loss thresholds from $200,000 to $10,000, where they remain today. See IIRIRA § 321(a)(7), 110 Stat. 3009-628. At the same time, it also added "rape" and "sexual abuse of a minor" to Subparagraph (A), see *id.* § 321(a)(1), 110 Stat. 3009-627, and it significantly expanded the reach of other pre-existing categories. For instance, it reduced the term-of-imprisonment thresholds for several categories from five years to one year, where they remain today. See IIRIRA § 321(a)(3), (4), (10), and (11), 110 Stat. 3009-627 to 3009-628; 8 U.S.C. 1101(a)(43)(F), (G), (J), (P), (R) and (S). In addition, IIRIRA expressly provided that the expanded definition of aggravated felony applies

"[n]otwithstanding any other provision of law (including any effective date), * * * regardless of whether the conviction was entered before, on, or after [IIRIRA's effective date of] September 30, 1996." 8 U.S.C. 1101(a)(43); see IIRIRA § 321(b), 110 Stat. 3009-628.

An alien "convicted of an aggravated felony" is deportable under 8 U.S.C. 1227(a)(2)(A)(iii) and is also ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[2]

2. Petitioners, a husband and wife, are natives and citizens of Japan who were admitted to the United States as lawful permanent resident aliens in 1984. Pet. App. 13a, 101a. They operated restaurants incorporated in California, and were each a part owner of those corporate entities. *Id.* at 118a-119a, 128a-129a.

In 1997, petitioners were convicted, upon guilty pleas, of violating criminal provisions of the Internal Revenue Code. Pet. App. 13a-14a. Mr. Kawashima was convicted on one count of willfully making and subscribing a false corporate tax return for the tax year ending October 31, 1991, in violation of 26 U.S.C. 7206(1). Pet. App. 13a, 116a-117a. Mrs. Kawashima was convicted on

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[2] An aggravated-felony conviction, however, does not disqualify an alien from withholding of removal, unless it is deemed to be for "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). An alien with an aggravated-felony conviction may obtain deferral, but not withholding, of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Furthermore, an alien convicted of an aggravated felony is generally barred from seeking readmission following removal, but that bar is subject to waiver. 8 U.S.C. 1182(a)(9)(A)(iii).

one count of willfully assisting her husband in preparing the same false corporate tax return, in violation of 26 U.S.C. 7206(2). Pet. App. 14a.[3]

In his plea agreement, Mr. Kawashima conceded, among other things, that the relevant tax return "was false as to a material matter," that he "did not believe the return to be true and correct as to a material matter," and that he "acted willfully." Pet. App. 117a, 123a-124a. The parties stipulated that the amount of taxable income that petitioners had "failed to report" to the IRS totaled $1,034,240 (A.R. 135), and that the "total actual tax loss" for sentencing purposes was $245,126 (Pet.

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[3] Section 7206 provides, in relevant part, as follows:

> Any person who—
>
> (1) Declaration under penalties of perjury
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> (2) Aid or assistance
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. 7206.

App. 120a).[4] The plea agreement acknowledged that the court could "order [Mr. Kawashima] to pay restitution of $245,126." *Id.* at 117a. The parties also stipulated that the specific tax return that was the basis for Mr. Kawashima's guilty plea had failed to report taxable income of $76,645. A.R. 135; see also A.R. 130 (same figure included in Count 1 of the information, charging Mr. Kawashima with violating Section 7206(1)). In December 1997, Mr. Kawashima was sentenced to four months of imprisonment, to be followed by one year of supervised release, during which he was specifically ordered to "comply with the rules and regulations of the Immigration and Naturalization Service, and if deported from this country, either voluntarily or involuntarily, not [to] reenter the United States illegally." A.R. 144.

Mrs. Kawashima was sentenced to four months of imprisonment for her conviction under Section 7206(2). A.R. 6; see also A.R. 131 (Count 2 of the information, charging her with violating Section 7206(2), specifying that she acted "willfully" and that she "knew" that the tax return in question falsely failed to report $76,645 in income). Her plea agreement is not in the record, but,

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[4] Petitioners err in claiming (Br. 4 n.3) that the "actual tax loss" stipulated in the plea agreement was "the gross amount of income omitted and not reported on the tax return[s]," and that the amount did not reflect "any allowable deductions." In fact, the amount expressly took "into account the federal income tax deduction to which each corporation was entitled for California State Tax liability," Pet. App. 120a-121a, and the calculated "actual tax loss" of $245,126 was 23.7% of the $1,034,240 in taxable income that the parties stipulated that petitioners had failed to report to the IRS. See A.R. 135 (containing paragraph 11 of Mr. Kawashima's plea agreement, which is not reprinted in the petition appendix excerpts and which includes the stipulated amounts of the "taxable income which the government can prove the Kawashimas failed to report" for two corporations for multiple tax years).

like her husband's, it contained concessions about the false nature of the tax return and her willful conduct, as well as the same figures pertaining to unreported income, actual tax loss, and restitution. Pet. App. 127a-131a.[5]

Before their convictions became final, petitioners filed applications to become naturalized citizens. A.R. 6; Supp. A.R. 13. After an interview on May 3, 2000, they were deemed ineligible for naturalization on account of their convictions, and their applications were denied. *Ibid.*

3. In August 2000, the Immigration and Naturalization Service (the predecessor to the Department of Homeland Security (DHS)) charged each petitioner with

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[5] Although petitioners included excerpts of Mrs. Kawashima's plea agreement in the petition appendix, petitioners now acknowledge (Br. 35 n.17) that, as the court of appeals explained (Pet. App. 24a, 94a) and as the government pointed out in its brief opposing certiorari (at 3 n.2), that document was not part of the record before the court of appeals or the Board of Immigration Appeals. Petitioners invite this Court to take judicial notice of the plea agreement in order to establish that Mrs. Kawashima "admitted to assisting in preparation of a false statement, but not to fraud." Br. 36 n.17. The government believes that judicial notice would be inappropriate and unnecessary. By statute, a "court of appeals shall decide [a petition for review of an order of removal] *only* on the administrative record on which the order of removal is based." 8 U.S.C. 1252(b)(4)(A) (emphasis added). The court of appeals thus correctly remanded the proceeding against Mrs. Kawashima to permit the government to introduce the plea agreement (or other evidence) to establish the loss associated with her offense. Pet. App. 25a-27a. There is, however, no need to consult the agreement to answer the sole question before this Court with respect to Mrs. Kawashima: whether a Section 7206(2) offense may be an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i). As discussed below, the answer to that question depends on the general nature of Section 7206(2) offenses, not the specific circumstances of her individual case.

being removable under 8 U.S.C. 1227(a)(2)(A)(iii), as an alien who had been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) and (ii). Pet. App. 102a.[6] Appearing through counsel, petitioners admitted that they had been convicted of violating Section 7206(1) and (2), but they denied the allegation that the loss to the victim or the revenue loss to the government exceeded $10,000, denied the charge of removability, and moved to terminate the proceedings. *Id.* at 102a-103a; A.R. 161, 189. In an oral decision issued on February 14, 2001, the immigration judge (IJ) sustained the charges of removability and ordered that petitioners be removed to Japan. Pet. App. 103a.

4. On initial appeal, the Board of Immigration Appeals (Board) determined that the tape recording of a part of the proceedings before the IJ was defective, preventing its review, and remanded the case for further proceedings. Pet. App. 103a; A.R. 104. On remand, the IJ received additional briefing and argument about petitioners' deportability, ruled that they were deportable as charged, and again ordered that they be removed. Pet. App. 104a-105a; A.R. 47-48.

On August 16, 2004, the Board affirmed the orders of removal. Pet. App. 108a (order pertaining to Mr. Kawashima); A.R. 165 (order pertaining to Mrs. Kawashima).

5. On August 27, 2004, petitioners filed a petition for review of the Board's orders in the court of appeals. As

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[6] Petitioners assert (Br. 5 n.4) that the lapse of time between their convictions and the initiation of removal proceedings against them "suggest[s] uncertainty within the Department of Justice and INS on whether [petitioners'] crimes of conviction were aggravated felonies." But the pendency of petitioners' applications for naturalization—which were denied the day before the INS issued the notice to appear for the removal proceeding—is a more likely explanation for the timing.

relevant here, the court ultimately denied the petition for review of the order of removal with respect to Mr. Kawashima, but, with respect to Mrs. Kawashima, it granted the petition and remanded for further proceedings in light of this Court's decision in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009). Pet. App. 23a, 27a, 31a.[7]

As the case progressed, the court of appeals issued four opinions. It repeatedly held that offenses under 26 U.S.C. 7206(1) and (2) can qualify as aggravated felonies under 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 15a-20a. The court held that both of petitioners' convictions were for offenses that "necessarily 'involve[] fraud or deceit.'" *Id.* at 17a; see also *id.* at 22a-24a. The court reasoned that, on the basis of "the plain meaning of the statutory language," Subparagraph (M)(i) encompasses tax offenses involving fraud and deceit when the tax loss exceeds $10,000. *Id.* at 17a. The court acknowledged that a divided panel of the Third Circuit had ruled otherwise in *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218 (2004), but it declined to follow that decision. Pet. App. 17a-20a. Those aspects of the court's decision did not change between its successive opinions. See *id.* at 38a-42a, 86a-90a. The opinions did, however, differ with respect to whether the $10,000-loss threshold under Subparagraph (M)(i) had been satisfied.

In its initial decision, issued on September 18, 2007, the court of appeals held that the $10,000-loss threshold was proved in Mr. Kawashima's case by the stipulation in his plea agreement regarding "the total actual tax

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[7] The court of appeals also denied relief in petitioners' subsequent petition for review, pertaining to the Board's June 2005 denial of petitioners' April 2005 motion to reopen proceedings. See Supp. A.R. 2-3; Pet. App. 27a-30a. In this Court, petitioners have not renewed any challenges to the Board's denial of their motion to reopen.

loss" resulting from his crime. Pet. App. 93a. But the court observed that Mrs. Kawashima's plea agreement was not in the record and that she had "expressly denied that such loss occurred"; the court thus concluded that the $10,000-loss threshold had not been proved with respect to her. *Id.* at 94a-96a.

On July 1, 2008, the court of appeals granted petitioners' petition for rehearing. Pet. App. 53a-54a. The court withdrew its initial opinion and issued a superseding per curiam opinion and judgment in which it granted the petition for review of the order of removal as to both petitioners and ruled that neither petitioner is removable from the United States. *Id.* at 60a-66a. In light of an intervening en banc decision (*Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063 (9th Cir. 2007)), the court held that the $10,000-loss threshold could not be proved by considering matters beyond the elements of the offense of conviction, and it reasoned that, because loss to a victim is not an element of 26 U.S.C. 7206(1) or (2), petitioners' offenses could not be aggravated felonies under Subparagraph (M)(i). Pet. App. 54a, 60a-66a. The government petitioned for panel rehearing and rehearing en banc.

While the government's rehearing petition was pending, this Court granted certiorari in *Nijhawan* v. *Mukasey*, 129 S. Ct. 988 (2009), to address whether an offense involving fraud could satisfy Subparagraph (M)(i) when the $10,000-loss threshold could not be established by the elements of that offense. See Pet. App. 13a. In its decision on the merits in *Nijhawan*, this Court expressly rejected the view that the court of appeals had taken in its July 1, 2008, opinion in this case. See 129 S. Ct. at 2298 (citing the decision in this case as part of the underlying circuit split).

On January 27, 2010, after receiving supplemental briefing about the effect of *Nijhawan* on this case, the court of appeals withdrew its second opinion and issued a superseding opinion and judgment. Pet. App. 33a-52a. As it had in its initial opinion, the court held that offenses under 26 U.S.C. 7206(1) and (2) could constitute aggravated felonies under Subparagraph (M)(i), notwithstanding the specific reference in Subparagraph (M)(ii) to tax-evasion offenses under 26 U.S.C. 7201. Pet. App. 38a-42a. The court further held that Mr. Kawashima's offense under Section 7206(1) was one involving fraud or deceit and that the Board had used "fundamentally fair procedures" in finding that the $10,000-loss threshold had been satisfied, because he had stipulated in his plea agreement that the "total actual tax loss" associated with the offense was $245,126. *Id.* at 43a-44a.

With respect to Mrs. Kawashima, the court of appeals determined that her offense under Section 7206(2) was also one that "necessarily 'involves fraud or deceit.'" Pet. App. 45a. For purposes of establishing whether the $10,000-loss threshold had been satisfied, the court recognized that, in light of *Nijhawan*, there might be adequate evidence for the Board to determine that her offense involved a loss exceeding $10,000. *Id.* at 46a-47a. It thus remanded to the Board for further consideration and receipt of additional evidence concerning whether her conviction satisfied the $10,000-loss threshold. *Id.* at 47a-49a.[5]

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[5] The court of appeals rejected petitioners' contention that Mrs. Kawashima's case was no longer before that court because neither party had sought rehearing with respect to her after its initial decision in September 2007. Pet. App. 45a n.8. Petitioners challenged that aspect of the court of appeals' decision in the second question of their petition

On August 4, 2010, the court of appeals denied rehearing en banc and issued a final superseding opinion that was, as relevant here, materially identical to the January 27, 2010, opinion. Pet. App. 2a, 12a-31a.

Judge Graber, joined by Judges Wardlaw and Paez, dissented from the denial of rehearing en banc. Pet. App. 3a-12a. Judge Graber acknowledged that the phrase "loss to the victim or victims" in Subparagraph (M)(i) "is broad enough that it *might* encompass a tax revenue loss to the government." *Id.* at 3a. In her view, however, when the statute is considered as a whole, Subparagraph (M)(ii) identifies the entire universe of tax offenses that might constitute aggravated felonies under 8 U.S.C. 1101(a)(43). Pet. App. 6a-10a.

SUMMARY OF ARGUMENT

A. Petitioners were convicted of violating 26 U.S.C. 7206(1) and (2), which apply when someone willfully makes (or aids in the making of) statements that are false as to a material matter on a federal tax return or other document filed with the IRS. Both of those offenses satisfy the plain meaning of the portion of the definition of aggravated felony appearing at 8 U.S.C. 1101(a)(43)(M)(i), because those offenses "involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000." The elements of each petitioner's offense of conviction required the government to prove, *inter alia*, that they acted willfully and that the tax return in question involved a false statement about a material matter. Because a falsehood becomes "material" if it bears on the correct computation of tax or has the tendency to impede the IRS in ascertaining or verifying the

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for a writ of certiorari, but this Court's writ of certiorari was limited to the first question. See 131 S. Ct. 2900 (2011).

correctness of the tax liability, petitioners' offenses (*i.e.*, their willfully made materially false statements) necessarily "involve[d] * * * deceit" for purposes of Subparagraph (M)(i).

Petitioners contend that their offenses did not necessarily involve fraud or deceit because "a conviction under § 7206(1) does not collaterally estop [a] taxpayer from disputing fraud" in a subsequent civil suit under 26 U.S.C. 6663. Pet. Br. 38 (discussing *Wright* v. *Commissioner*, 84 T.C. 636 (1985)). But petitioners overstate the effect of the Tax Court's decision in *Wright*, which merely recognized that a conviction under Section 7206(1) cannot establish (for purposes of a civil suit under the statutory predecessor to Section 6663) that a taxpayer made an "underpayment * * * due to fraud," because such an offense does not require any underpayment at all. 84 T.C. at 642-643.

B. Petitioners' principal argument is that, even assuming that offenses under Section 7206(1) and (2) are included within the plain meaning of Subparagraph (M)(i), the presence of Subparagraph (M)(ii), which refers to tax-evasion offenses under Section 7201, but not to other tax-related offenses, implicitly withdraws convictions under Section 7206 and other "tax crimes" from the scope of the aggravated-felony definition in Subparagraph (M)(i). Yet none of the canons of construction that petitioners invoke supports their attempt to draw such negative implications from Subparagraph (M)(ii).

1. Petitioners contend that Subparagraph (M)(ii) is a specific rule that applies to "tax crimes" and thus controls the more general rule governing "fraud or deceit" crimes in Subparagraph (M)(i). But the specific-controls-the-general canon is inapplicable here for several reasons. Subparagraph (M)(ii) is not a specific pro-

vision that deals with a whole class of "tax crimes," because it mentions only one kind of tax crime (tax-evasion offenses under Section 7201), and it does not suggest, much less define, a broader category of "tax crimes" that is addressed by a supposed negative implication of Subparagraph (M)(ii). Nor can petitioners rely on the reference in Subparagraph (M)(ii) to "revenue loss to the Government," because that phrase appears in qualifying language that serves to limit the reference to tax evasion, which necessarily involves revenue loss. Petitioners' reading would also raise practical difficulties about how to categorize other offenses that indisputably involve fraud and taxes, including 18 U.S.C. 371 offenses to defraud the United States. In any event, there is no conflict between the purportedly-tax-crime-specific rule in Subparagraph (M)(ii) and the fraud-or-deceit rule in Subparagraph (M)(i), because they both contain (and have always contained) the same monetary threshold.

2. Petitioners also invoke the canon counseling avoidance of superfluities, but it, too, fails to support their reading of the statute, because Congress would have had good reason to ensure that tax-evasion offenses were included among the list of aggravated felonies, even at the risk of some minor redundancy with Subparagraph (M)(i). Among other things, this Court had, in the context of construing a statute of limitations, previously rejected the government's argument that "[a]ny effort to defeat or evade a tax is * * * tantamount to and [possesses] every element of an attempt to defraud the taxing body." *United States* v. *Scharton*, 285 U.S. 518, 521 (1932). This Court had also taken pains to stress that tax evasion under Section 7201 may occur "in any manner," and it thus appeared to have held open the possibility that Section 7201 could be vio-

lated by conduct that did *not* have "the likely effect" of "mislead[ing]" or "conceal[ing]." *Spies* v. *United States*, 317 U.S. 492, 499 (1943). Moreover, other provisions of the aggravated-felony definition overlap with each other to considerable degrees, indicating that there is particularly little reason to conclude that Congress intended to exclude other tax-related crimes from the definition by specifying the inclusion of Section 7201 offenses. Thus, even assuming that some redundancy results from the court of appeals' construction of Subparagraph (M)(i), this case is one in which the purported negative inferences from Subparagraph (M)(ii) are "too shaky to be trusted" because "Congress could sensibly have seen some practical value in the redundancy of making [something] clear beyond question." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 444-445 (1995) (Souter, J., dissenting).

3. Petitioners also contend that the structure of the Sentencing Guidelines indicates that Congress intended to deal with tax offenses separately from "fraud or deceit" offenses. There simply is, however, no indication that Congress was echoing the Sentencing Guidelines in implicitly drawing such a distinction.

4. Finally, petitioners invoke principles of lenity, but those principles do not support petitioners' case. This Court has repeatedly rejected the contention that a division in judicial authority establishes that a statute is "ambiguous" for purposes of lenity. See, *e.g.*, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995). Nor does this case involve the kind of "grievous ambiguity" (*Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998)) and "equipoise of competing reasons" (*Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000)) that would be required before invoking even the criminal rule of lenity (which is

not applicable here because the relevant part of the aggravated-felony definition is not a criminal statute). In any event, if the Court were to conclude that Subparagraph (M)(i) is ambiguous with respect to its applicability to "tax crimes," that would still not warrant the disposition that petitioners request (a determination that they cannot be deported, see Pet. Br. 47). Instead, the "proper course" would be to "remand to the agency" to "exercise[] its *Chevron* discretion to interpret the statute" in the first instance. *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (internal quotation marks omitted).

ARGUMENT

PETITIONERS HAVE EACH BEEN CONVICTED OF AN AGGRAVATED FELONY AS DEFINED IN 8 U.S.C. 1101(a)(43)(M)(i)

A. Petitioners' Convictions For Willfully Making Materially False Statements To The IRS Necessarily "Involve[d] Fraud Or Deceit" And Are Thus Convictions For Aggravated Felonies Under Subparagraph (M)(i)

The text of 8 U.S.C. 1101(a)(43)(M)(i) defines "aggravated felony" as including an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." With the exception of evidentiary questions in Mrs. Kawashima's case to be resolved on remand to the agency (see note 5, *supra*; Pet. App. 25a-27a), there is no dispute about whether petitioners' offenses satisfied the monetary-loss threshold in Subparagraph (M)(i). The corporate tax return underlying their convictions falsely failed to report taxable income of

$76,645. See p. 6, *supra*.[9] Petitioners contend, however, that the tax offenses of which they were convicted do not satisfy Subparagraph (M)(i) because they did not require, as an element of the offense, a finding of fraud or deceit. Pet. Br. 33-41. But petitioners' offenses of conviction did "involve[] fraud or deceit," because they necessarily entailed a willful violation of petitioners' known legal duty not to make (or aid in the making of) a false statement as to any material matter on a tax return.

1. Petitioners' offenses of conviction necessarily "involve[d] * * * deceit" for purposes of the definition of aggravated felony in Subparagraph (M)(i). The term "deceit" is defined as "1. The act of intentionally giving a false impression," or "2. A false statement of fact made by a person knowingly or recklessly * * * with the intent that someone else will act upon it." *Black's Law Dictionary* 465 (9th ed. 2009). Petitioners' respective crimes of conviction, by their nature, satisfy that definition, because they required the government to prove that petitioners willfully made materially false statements in the corporate tax return that they filed with the IRS.

Mr. Kawashima was convicted of violating 26 U.S.C. 7206(1). That provision is violated when someone "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a

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[9] Although petitioners previously maintained that the government could not satisfy the monetary-loss threshold because the amount of the loss had not been an element of their offenses of conviction, that argument is now foreclosed by this Court's decision in *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2303 (2009) (holding that IJ properly relied on sentencing-related material from criminal proceeding to establish that the government had satisfied its burden under 8 U.S.C. 1229a(c)(3)(A) of proving by "clear and convincing" evidence a loss in excess of $10,000).

written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. 7206(1). There is no dispute that the elements of that offense include a requirement that the document in question was "false as to a material matter," that the defendant "did not believe the * * * document to be true and correct as to every material matter," and that he acted "willfully, with the specific intent to violate the law." U.S. Dep't of Justice, *Criminal Tax Manual* § 12.05 (2008 ed.), http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2012.htm; see also Pet. App. 117a (plea agreement, reciting elements of offense); 2 Kenneth E. North, *Criminal Tax Fraud* § 16.56, at 85 (3d ed. 1998).

Mrs. Kawashima was convicted of violating 26 U.S.C. 7206(2). That provision is violated when someone "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under * * * the internal revenue laws[] of a * * * document, which is fraudulent or is false as to any material matter." 26 U.S.C. 7206(2). There is no dispute that the elements of the offense include a requirement that "[t]he document was false as to a material matter," and that the defendant acted willfully. U.S. Dep't of Justice, *Criminal Tax Manual* § 13.04 (2008 ed.), http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2013.htm; see also 2 North § 16.67, at 98 (including "falsity," "materiality," and "willfulness").[10]

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[10] One of the amicus briefs in support of petitioner states that "a conviction under Section 7206(2) does not even require proof of knowledge that information provided on a tax return was false." Walters Amicus Br. 18-19 n.13. In fact, the statute—which applies to someone other than the one who presents a document—plainly requires that the *defen-*

In light of the elements just described, both of petitioners' offenses entailed willful conduct and a materially false statement. A falsehood is "material" if it "bears on the correct computation of tax" or "if it has the tendency to impede the IRS in ascertaining or verifying the correctness of the taxpayer's tax liability." 2 North § 16.63, at 92. As a result, petitioners' offenses necessarily "involve[d] * * * deceit" for purposes of the aggravated-felony defined in Subparagraph (M)(i). See Pet. App. 22a, 24a; *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 173 (5th Cir. 2008) ("'Willfully' and knowingly signing and filing a false federal tax return unquestionably 'involves fraud or deceit[.]'"), cert. denied, 130 S. Ct. 736 (2009); *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) (Alito, J., dissenting) ("'Fraud' or 'deceit' is a necessary element of 26 U.S.C. § 7206(1)[.]"). Indeed, none of the courts or judges that otherwise agrees with petitioners has done so on the basis of a conclusion that Section 7206(1) or (2) does not "involve[] fraud or deceit."[11]

2. In contending that their offenses did not involve fraud or deceit, petitioners advance two arguments. Both are predicated on non sequiturs, and neither estab-

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dant act "[w]illfully" with respect to the document's being "fraudulent" or "false," though it specifies that the *person presenting the document* need not have "knowledge or consent" of the "falsity or fraud." 26 U.S.C. 7206(2) (emphasis added).

[11] See Pet. App. 8a n.2 (Graber, J., dissenting from denial of rehearing en banc) (not addressing the question but implicitly assuming that tax crimes other than tax evasion may "happen to involve fraud or deceit"); *Arguelles-Olivares*, 526 F.3d at 183-184 (Dennis, J., dissenting) (noting that alien did "not contest that his conviction under [Section 7206(1)] 'involves fraud or deceit' within the meaning of the removability provision"); *Ki Se Lee*, 368 F.3d at 222-224 (not addressing the question).

lishes that petitioners' willfully and materially false representations to the IRS did not constitute deceit.

a. Petitioners claim (Br. 37) that the court of appeals erroneously "equate[d]" willfulness "with fraud and/or deceit." But the relevant point, as the court of appeals made clear (Pet. App. 22a-24a), is not merely that petitioners' actions were willful—which meant that they involved the "voluntary, intentional violation of a known legal duty," *United States* v. *Cheek*, 498 U.S. 192, 201 (1991)—but also that the statements in the relevant document were materially false.

b. Petitioners also contend (Br. 37-40) that their offenses did not necessarily involve fraud or deceit because "a conviction under § 7206(1) does not collaterally estop [a] taxpayer from disputing fraud" in a subsequent civil suit under 26 U.S.C. 6663 (or its statutory predecessor in 26 U.S.C. 6653 (1988)). Pet. Br. 38 (discussing *Wright* v. *Commissioner*, 84 T.C. 636 (1985)). But petitioners overstate the effect of the Tax Court's decision in *Wright*.

The civil-fraud statute at issue in *Wright* required the government to prove that the taxpayer had made an "underpayment * * * due to fraud." 84 T.C. at 639 (quoting 26 U.S.C. 6653(b)(1) (1982)). The Tax Court concluded that a conviction under Section 7206(1) does not necessarily establish such an underpayment because, unlike 26 U.S.C. 7201 (which addresses tax evasion), Section 7206(1) can be violated by materially false statements "irrespective of the tax consequences of the falsification." 84 T.C. at 642-643. Thus, the reason a taxpayer in a civil tax fraud suit is not estopped by a Section 7206(1) conviction from denying an "underpayment * * * due to fraud" is that it would not have been necessary to prove an *underpayment*—let alone a willful

one—in the earlier criminal prosecution.[12] *Wright* does not demonstrate that willfully and materially false statements do not involve "deceit."

Thus, under the plain meaning of Subparagraph (M)(i), petitioners' convictions under Sections 7206(1) and (2) qualify as aggravated felonies (assuming that the government satisfies its burden on remand with respect to the monetary threshold in Mrs. Kawashima's case).

B. No Canon Of Statutory Construction Warrants A Departure From The Plain Meaning Of Subparagraph (M)(i)

Petitioners' principal argument (Br. 15-33)—like that of the lower-court judges who have agreed with their conclusion—is that, even if offenses under Section 7206(1) and (2) are encompassed within the plain meaning of Subparagraph (M)(i), the presence of Subparagraph (M)(ii), which refers to tax-evasion offenses under Section 7201 but not to other tax-related offenses, implicitly withdraws convictions under Section 7206 and other "tax crimes" from the scope of the aggravated-felony definition in Subparagraph (M)(i).

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[12] Of course, even though Section 7206(1) and (2) do not require the government to establish in the criminal proceeding that there was an underpayment of taxes, Subparagraph (M)(i) does require Immigration and Customs Enforcement to establish in a later removal proceeding that there was indeed a loss. That additional requirement thus vitiates objections that Subparagraph (M)(i) should not be triggered by "lesser tax crimes than tax evasion" under 26 U.S.C. 7201. Pet. Br. 24. Indeed, although Section 7201 offenses have a longer statutory maximum sentence (five years) than petitioners' offenses under Section 7206(1) and (2) (three years), the Sentencing Guidelines otherwise provide for essentially identical treatment. All three offenses have the same base offense level, which depends on the amount of the tax loss, computed from the same table whether the conviction is under Section 7201, 7206(1), or 7206(2). See Sentencing Guidelines §§ 2T1.1(a), 2T1.4(a), 2T4.1.

Petitioners rely on various canons of construction: that statutory language must be construed in context, see, *e.g.*, *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006); *Deal* v. *United States*, 508 U.S. 129, 132 (1993); that the Court is reluctant to "apply[] a general provision when doing so would undermine limitations created by a more specific provision," *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996); and that statutes are generally construed to avoid superfluities when there is no reason to believe that Congress might have preferred to make something clear even at the risk of being redundant, see, *e.g.*, *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248-2249 (2011). But all such "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Petitioners' contention that "tax crimes" are categorically excluded from the scope of Subparagraph (M)(i) despite its plain text that includes all offenses involving "fraud or deceit" resulting in a loss exceeding $10,000 is not supported by any of the canons they invoke. Instead, the context of the entire definition of "aggravated felony" supports the contrary conclusion that Congress meant what it said in the text of Subparagraph (M)(i) and that, in adding further categories to Section 1101(a)(43), it was being inclusive and was expanding, rather than implicitly contracting, that definition's scope. Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 295 n.4 (2001) (noting that "the term ['aggravated felony'] has always been defined expansively, [and] it was broadened substantially by IIRIRA").

1. Subparagraph (M)(ii) is not a specific rule that implicitly excludes all "tax crimes" from the scope of Subparagraph (M)(i)

Petitioners seek to draw a contrast between Subparagraph (M)(i) and Subparagraph (M)(ii) on the ground that the former refers to "loss to the victim or victims" and the latter refers to "revenue loss to the Government." Br. 17-18. From that difference in phrasing, petitioners infer (Br. 18-19, 25-26) that Congress intended to exclude "revenue loss" offenses from Subparagraph (M)(i) because the more specific reference to "revenue loss" should control the general reference to "loss" in Subparagraph (M)(i). But petitioners' attempt to read Subparagraph (M)(ii) as an enumeration of all relevant "tax crimes" (Br. 26) is without merit for several reasons.

a. As this Court has explained, it is a familiar proposition that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate* v. *United States*, 130 S. Ct. 1345, 1354 (2010) (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)). The canon is a "warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.*, 516 U.S. at 511.

The specific-controls-the-general canon, however, is inapplicable here, because the statute does not have a specific provision that deals with a whole class of "tax crimes." Petitioners would have Subparagraph (M)(ii) play that role, but it is, in fact, much narrower than that. Nothing in Subparagraph (M)(ii) actually refers to or demonstrably evokes the category of all "tax crimes" that petitioners assert that it governs. Instead, Sub-

paragraph (M)(ii) identifies just one kind of crime—that "described in section 7201 of title 26 (relating to tax evasion)"—which is in turn further limited to instances "in which the revenue loss to the Government exceeds $10,000." Neither part of that definition provides a way to identify what other "tax crimes" should be deemed to be implicitly excluded from Subparagraph (M)(i). Because the first part of the clause refers only to Section 7201 offenses, there is no way to extrapolate from that single point and reliably conclude that the clause represents Congress's attempt to enumerate all "tax crimes" that qualify under Subparagraph (M)(i) *or* (ii), rather than simply identifying as qualifying under Subparagraph (M)(ii) the category that is actually mentioned in the text (offenses "described in section 7201" relating to "tax evasion"). In other words, Congress's provision of a single exemplar does not serve as "language suggesting exclusiveness" within a broader category (such as tax crimes), nor as a "series of terms from which an omission bespeaks a negative implication." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002). Cf. *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) (noting that, in the context of "a classic and well known triumvirate," the specific mention of two items implies the intentional exclusion of the third, because "it would be strange to mention specifically only two, and leave the third to implication").

Although petitioners rely (Br. 26) on this Court's decision in *HCSC-Laundry* v. *United States*, 450 U.S. 1 (1981), the statute there was crucially different, because it did define the category in question as well as specify a series of terms, thus making it reasonable to draw negative implications. In *HCSC-Laundry*, the Court held that an organization that provided laundry services to

hospitals could be denied a tax exemption under 26 U.S.C. 501(c)(3). Although the organization could have satisfied the general criteria for tax-exempt organizations in Section 501(c)(3) itself, the Court held that the organization's eligibility was instead controlled by Section 501(e), which dealt specifically with "cooperative hospital service organizations." See 450 U.S. at 6 ("Congress intended subsection (e) to be exclusive and controlling for cooperative hospital service organizations."). In doing so, however, the Court did not have to invent the category of "cooperative hospital service organizations," because that was the title of Subsection (e). See *id.* at 3 n.3 (quoting statute). In addition, the statute enumerated 12 different activities (not including laundry services) that such an organization could perform and be entitled to treatment as a charitable organization. *Id.* at 5-6. There was thus a textual basis for the Court's conclusion that Congress had specifically addressed qualifying hospital service organizations in Subsection (e), and that the express inclusion of 12 activities in that provision was intended to exclude an activity (such as laundry services) that was obviously "essential to a hospital's operation" and therefore "noticeable for its absence." *Ibid.*

By contrast, the reference here to only a single statutory provision concerning tax evasion does not suggest, much less define, a broader category of "tax crimes" that is addressed by a supposed negative implication of Subparagraph (M)(ii).[13]

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[13] Petitioners' attempt to make Subparagraph (M)(ii) a self-contained "tax crimes" component of the aggravated-felony definition is further weakened by the presence of other provisions that expressly include tax crimes, see 8 U.S.C. 1101(a)(43)(E) (expressly referring to firearms-related offenses from Internal Revenue Code), or are broad enough to

b. Petitioners seek to remedy that defect by pointing (Br. 25-26) to the second part of the clause, which refers to a "revenue loss to the Government." But that reference cannot reasonably be read as indicating that Subparagraph (M)(ii) enumerates all the tax crimes that fall within the aggravated-felony definition.

Allowing "revenue loss" to dictate the scope of Subparagraph (M)(ii) misconceives the relationship between the two halves of (M)(ii). As the Court recognized in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), the reference to "revenue loss to the Government" in the second half of Subparagraph (M)(ii) "calls for circumstance-specific application" based on the facts of the particular alien's case and does not depend on the generic nature of the offenses in the first half. *Id.* at 2301. The second half is thus the "qualifying language," *ibid.*, the purpose of which is to limit the preceding category of offenses (*i.e.*, those "described in section 7201 of title 26 (relating to tax evasion)"). That relationship is also expressed by Congress's use of the phrase "in which" to introduce "revenue loss to the government." See *ibid.* (noting that "[t]he words 'in which' * * * modify 'offense'").

Because the reference to "revenue loss" in Subparagraph (M)(ii) qualifies the reference to Section 7201 offenses, the fact that the phrase is more specific than the one in Subparagraph (M)(i) is unremarkable. The qualifying language in Subparagraph (M)(ii) performs the function of further limiting a category that comprises *only* Section 7201 offenses—which require proof of "the existence of a tax deficiency," *Boulware* v. *United States*, 552 U.S. 421, 424 (2008) (quoting *Sansone* v.

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cover certain tax-related crimes, see 8 U.S.C. 1101(a)(43)(R) (including "forgery") and (S) (including "an offense relating to * * * perjury").

United States, 380 U.S. 343, 351 (1965))—and thus necessarily result in a revenue loss to the Government. It was therefore entirely appropriate for Congress to use the phrase "revenue loss to the Government," without giving rise to the implication that the difference in terminology between Subparagraphs (M)(i) and (ii) somehow transforms the latter into the only part of the aggravated-felony definition that may involve losses to the Government resulting from the violation of criminal tax prohibitions. To the contrary, because Subparagraph (M)(i) encompasses a broader and more general category of crimes that extends well beyond situations in which the Government is the victim, it is natural that it would use more general language—"loss to the victim or victims"—to describe the amount of loss necessary to qualify the offense as an aggravated felony. Subparagraph (M)(ii) thus articulates the rule for tax-evasion offenses under Section 7201, but it does not affirmatively speak more broadly than that.

c. Petitioners' attempt to make it do so—to extrapolate from "tax evasion" to "tax crimes" without any textual directive or guidance—poses practical problems about how to categorize offenses that indisputably involve fraud and taxes. For instance, 18 U.S.C. 371, in relevant part, makes it a crime for two or more persons to "conspire * * * to defraud the United States, or any agency thereof in any manner or for any purpose." In *Nijhawan*, this Court included Section 371 in the list of "widely applicable federal fraud statute[s]" that it believed should not be excluded from the scope of Subparagraph (M)(i) simply because they contain no "monetary loss threshold" in the definition of the offense. 129 S. Ct. at 2301. Under petitioners' reading, however, Section 371 offenses would presumably not be included

within the scope of Subparagraph (M)(i) if their monetary losses came in the form of revenue losses to the Government. That would exclude an established kind of Section 371 offense known as a "*Klein* conspiracy," which is a "conspirac[y] to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the [IRS] in the ascertainment, computation, assessment, and the collection of the revenue; to wit, income taxes." *United States* v. *Klein*, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). See generally U.S. Dep't of Justice, *Criminal Tax Manual* § 23.07[2] (2008 ed.), http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2023.htm. It would be passing strange to conclude—as petitioners' logic seems to require—that some conspiracies "to defraud the United States" under Section 371 would "involve[] fraud or deceit" for purposes of Subparagraph (M)(i), while others would not. Moreover, to the extent that a *Klein* conspiracy charge is a recognized alternative to a tax-evasion charge under Section 7201, it would also be odd for the express mention of Section 7201 offenses to have the effect of excluding *Klein* conspiracies from Subparagraph (M) altogether.

d. In any event, even if Subparagraphs (M)(i) and (ii) were seen as prescribing different rules for two overlapping categories of loss, there still would not be any reason for the specific "revenue loss to the Government" qualifier in Subparagraph (M)(ii) to control the more general reference to "loss to the victim or victims" in Subparagraph (M)(i), because there is no conflict between the two loss limitations. Both provisions have always prescribed the same monetary threshold: $200,000 between 1994 and 1996, and $10,000 since 1996 (see p. 3, *supra*). Thus, to the extent that an offense involves a

"loss to the victim" that also happens to be "a revenue loss to the Government," there is no need to choose between the two, as there could be if the revenue-loss threshold were higher. See *National Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 335-336 (2002) ("It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict."). If the loss in question exceeds $10,000, then the monetary-loss threshold contained in either clause is satisfied. As a result, the "rationale" for the greater-controls-the-lesser canon is inapplicable, because allowing a fraud or deceit offense in which the loss exceeds $10,000 to be treated as an aggravated felony simply would not have the effect of "undermin[ing] limitations created by a more specific provision." *Varity Corp.*, 516 U.S. at 511 (citation omitted).

2. The canon counseling avoidance of superfluities does not support petitioners' construction

As petitioners note (Br. 19), this Court typically seeks to construe statutes in ways that avoid making any parts of them superfluous. It has, however, often recognized that "[t]here are times when Congress enacts provisions that are superfluous." *Microsoft Corp.*, 131 S. Ct. at 2249 (quoting *Corley* v. *United States*, 129 S. Ct. 1558, 1572-1573 (2009) (Alito, J., dissenting)); see also *Connecticut Nat'l Bank*, 503 U.S. at 253 ("Redundancies across statutes are not unusual events in drafting").

Petitioners contend that the practice of construing statutes to avoid superfluities requires the Court to adopt a construction of Subparagraph (M)(i) that does not include tax-evasion offenses under Section 7201,

because such offenses would normally be covered by the reference to "fraud or deceit" in Subparagraph (M)(i), but they are listed separately in Subparagraph (M)(ii). See Pet. Br. 21. As petitioners note (Br. 21), there is a well-established body of case law, arising in the context of civil suits under 26 U.S.C. 6663 (or its statutory predecessor in 26 U.S.C. 6653 (1988)), supporting the proposition that, even though Section 7201 does not use the term "fraud," a conviction under Section 7201 necessarily entails an "underpayment" of taxes that is "due to fraud" in the sense meant by Section 6663, and that, for purposes of issue preclusion, a prior conviction under Section 7201 establishes in a civil suit that there has been an underpayment due to fraud. See *Wright*, 84 T.C. at 642 (noting that the Tax Court had previously "equated the element necessary for conviction under section 7201 (*i.e.*, an 'attempt to evade') with that essential for the imposition of the civil penalty under section 6653(b) (*i.e.*, an 'underpayment * * * due to fraud')" (citing *Amos* v. *Commissioner*, 43 T.C. 50, 55 (1964), aff'd, 360 F.2d 358 (4th Cir. 1965)); see also, *e.g.*, *Klein* v. *Commissioner*, 880 F.2d 260, 262 (10th Cir. 1989). From that unobjectionable premise, however, petitioners make an unwarranted leap to the conclusion that, in order to keep Subparagraph (M)(ii) from being "superfluous, Congress must have intended that M(ii) covers *the only* tax offense which is an aggravated felony, namely tax evasion under § 7201[,] under (M)." Pet. Br. 23. Petitioners' analysis is flawed for three principal reasons.

a. First, as explained above (see pp. 23-29, *supra*), petitioners erroneously assume that Subparagraph (M)(ii) somehow stands in for all "tax crimes," even though it mentions only one kind of tax crime (tax eva-

sion). Although petitioners rely (Br. 20) on *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), the failure of Subparagraph (M)(ii) to refer generally to "tax crimes" distinguishes it from a statute discussed there. In *Leocal*, the Court considered whether an offense for driving under the influence of alcohol (DUI) is a "crime of violence." In holding that it is not, the Court found that its conclusion was bolstered by a provision in the INA that defined "serious criminal offense" to mean, in part, "any crime of violence" *or* "any crime * * * of driving while intoxicated or under the influence of alcohol * * * if such crime involves personal injury to another." 543 U.S. at 12 (quoting 8 U.S.C. 1101(h)(2) and (3)). In *Leocal*, the second provision expressly referred to the relevant category of crimes (DUI offenses) that the Court found to be excluded from the first provision's reference to crimes of violence. Here, by contrast, Subparagraph (M)(ii) does not refer to the broader category of "tax crimes" identified by petitioners. Nor have they identified any other statutory provision that refers to both "crimes involving fraud or deceit" and "tax crimes," which might permit an inference, like the one in *Leocal*, that Congress understood the former category to be one that excludes the latter. Subparagraph (M)(ii) therefore does not have the same significance for "tax crimes" that the reference to DUI offenses had in *Leocal*.

Because there is no textual basis for concluding that Subparagraph (M)(ii) has negative implications extending to tax crimes other than tax evasion, petitioners' construction effectively requires the Court to create an ambiguity in the scope of Subparagraph (M)(ii)—as well as in Subparagraph (M)(i). But the Court has previously rejected that solution to a purported superfluity: "[w]here there are two ways to read the text [and] either

[a word] is surplusage, in which case the text is plain; or [the word] is nonsurplusage * * *, in which case the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate." *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004).

b. Second, petitioners simply assert without analysis (Br. 23) that there is no "basis at all" for thinking that Congress may have added Subparagraph (M)(ii) out of an abundance of caution, intending to make it clear that tax evasion should be considered an aggravated felony, even at the risk of creating a minor internal redundancy. There are, however, good reasons why Congress might have lacked confidence about whether Subparagraph (M)(i) "would be interpreted as covering all (or any) evasion cases." *Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting).

As an initial matter, unlike Section 7206(1) and (2), the text of Section 7201 does not actually use words and phrases like "fraud," or "false," or "does not believe to be true and correct." Instead, it speaks only of an "attempt * * * to evade or defeat any tax," 26 U.S.C. 7201, and thus does not on its face necessarily connote fraud or deceit.

Moreover, Congress could have been given serious pause by this Court's decision in *United States* v. *Scharton*, 285 U.S. 518 (1932). *Scharton* held that the federal offense of willfully attempting to evade taxes in any manner (in Section 7201's statutory predecessor, 26 U.S.C. 1266 (Supp. V 1931)) was governed by the three-year statute of limitations that was generally applicable to tax crimes, rather than the special six-year statute of limitations that was applicable to tax crimes involving "the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or

not, and in any manner." 285 U.S. at 520 n.2 (quoting 18 U.S.C. 585 (Supp. V 1931)). In the course of doing so, the Court expressly rejected the government's argument that the six-year limitation period should apply because fraud "is implicit in the concept of evading or defeating" and that "[a]ny effort to defeat or evade a tax is * * * tantamount to and [possesses] every element of an attempt to defraud the taxing body." *Id.* at 520-521. The Court reasoned that an averment of fraud in a tax-evasion suit "would be surplusage," because "it would be sufficient to plead and prove a wilful attempt to evade or defeat." *Id.* at 521.[14]

In addition, reasonable concerns may also have been raised by this Court's decision in *Spies* v. *United States*, 317 U.S. 492 (1943), which stressed that Congress had provided that tax evasion "may be accomplished 'in any manner.'" *Id.* at 499. *Spies* formulated the following list of the kinds of actions that could prove an "affirmative willful attempt" to evade taxes for purposes of Section 7201:

> keeping a double set of books, making false entries or alterations, or false invoices or documents, de-

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[14] Since 1954, the statute-of-limitations provisions in 26 U.S.C. 6531 have made clear that a six-year limitation period applies to Section 7201 offenses. See 26 U.S.C. 6531(2) (prescribing six-year period "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof"). They have done so, however, only by creating what petitioners would be obliged to consider a superfluity, since the immediately preceding subsection specifies that the same six-year period applies to "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." 26 U.S.C. 6531(1). In other words, Section 6531(1) applies to "offenses involving" fraud against the United States, and Section 6531(2) applies to tax-evasion offenses. The parallel to Clauses (i) and (ii) of Subparagraph (M) is quite strong.

> struction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, *and any conduct*, the likely effect of which would be *to mislead or to conceal.*

Ibid. (emphases added). Even though that list concluded with a catch-all term that would apparently capture "any conduct" that was fraudulent or deceitful, the Court still took pains to specify that its list was offered only "[b]y way of illustration, and not by way of limitation." *Ibid.* As a result, *Spies* appears to hold open the possibility—because the statute provides that tax evasion can occur "in any manner"—that Section 7201 could be violated without any act of fraud or deceit.

Furthermore, there are, in fact, some lower-court cases indicating that one kind of tax evasion—that pertaining to evasion of payment, rather than evasion of assessment—could occur without any false statements. The paradigmatic example would be that of a taxpayer who, whether or not he filed a truthful tax return, took affirmative steps to evade payment by moving his assets beyond the reach of the IRS. See, *e.g.*, *United States* v. *Pollen*, 978 F.2d 78, 81-82 (3d Cir. 1992) (describing two counts of indictment charging defendant with "knowingly and willfully attempt[ing] to evade the payment of * * * federal income taxes * * * by 'placing part of his assets out of reach of the United States Government' by causing" gold to be brought to a bank in Canada to be transferred to an account in Switzerland), cert. denied, 508 U.S. 906 (1993); *United States* v. *Trownsell*, 367 F.2d 815, 816 (7th Cir. 1966) (affirming conviction for attempting to evade and defeat the payment of federal income taxes by liquidating assets and causing the proceeds "to be deposited in a bank in Switzerland, thus

placing it beyond the reach of the Government"). In practice, even evasion-of-payment cases involving the transfer of assets beyond the IRS's reach will almost invariably involve some affirmative acts of fraud or deceit as a factual matter, and the government would certainly be expected to highlight any such acts in proving its criminal case. But, as then-Judge Alito noted in his dissenting opinion in *Ki Se Lee*, even if Congress was "certain that no defendant would ever be convicted of tax evasion without proof of fraudulent or deceitful conduct, the drafters might have been concerned that some courts would hold that tax evasion falls outside the scope of [Subparagraph (M)(i)] because neither 'fraud' nor 'deceit' is a formal element of the offense." 368 F.3d at 227.

Finally, Congress may have had uncertainty about how Subparagraph (M)(i) would operate in the context of tax offenses under state or foreign law. Section 1101(a)(43) specifies that the definition of aggravated felony "applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. 1101(a)(43) (penultimate sentence). Thus, even if Congress actually was confident that tax evasion would always be seen as involving "fraud or deceit" in the context of a federal offense under Section 7201 (and therefore could have been included in Subparagraph (M)(i) when viewed in isolation), that confidence would not likely extend to the categorization of tax offenses under state or foreign law. There would thus have been additional reason to prefer a clear incorporation of tax-evasion offenses, notwithstanding the reference in Subparagraph (M)(i) to offenses involving fraud or deceit.

There are, accordingly, quite plausible reasons to believe that Congress enacted Subparagraph (M)(ii) "simply to make certain—even at the risk of redundancy—that tax evasion qualifies as an aggravated felony." *Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting); see also Pet. App. 19a-20a (same); *Arguelles-Olivares*, 526 F.3d at 173 (5th Cir.) ("We agree with then-Judge (now Justice) Alito's and the Ninth Circuit's construction of subsection (43)(M)(i).") (footnote omitted).

c. Third, within the broader context of the definition of "aggravated felony" in Section 1101(a)(43), there is particularly little reason to conclude that Congress intended to exclude other tax-related crimes from the definition by specifying the inclusion of Section 7201 offenses. The aggravated-felony definition is not only "expansive[]." *St. Cyr*, 533 U.S. at 295 n.4. It also contains several other provisions that overlap to considerable degrees. For example, Subparagraph (A) refers to "murder, rape, or sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), and Subparagraph (F) refers to "a crime of violence (as defined in [18 U.S.C. 16] * * *) for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(F).[15] Because murder and rape typically carry sentences exceeding one year, those two components of the aggravated-felony definition are largely redundant (and rape was added to Subparagraph

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[15] A "crime of violence" is defined in 18 U.S.C. 16 as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(A) in 1996, six years after crimes of violence had been added to the definition, see pp. 2-3, *supra*). Similarly, Subparagraph (G) includes "burglary offense[s] for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), even though such offenses are also generally included within Subparagraph (F)'s reference to "crime[s] of violence."

Because the aggravated-felony definition already includes significant redundancies, it is particularly unlikely that Congress intended for the plain meaning of Subparagraph (M)(i) to be cabined by a negative implication that purportedly arises from the specification in Subparagraph (M)(ii) of one particular offense that was also included.

d. Thus, even assuming that some redundancy results from the court of appeals' construction of Subparagraph (M)(i), this case is one in which "Congress could sensibly have seen some practical value in the redundancy of making [something] clear beyond question," which would mean that "there is an explanation for redundancy, rendering any asserted inference from it too shaky to be trusted." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 444-445 (1995) (Souter, J., dissenting). Cf. *Connecticut Nat'l Bank*, 503 U.S. at 256 (O'Connor, J., concurring in the judgment) ("I think it far more likely that Congress inadvertently created a redundancy than that Congress intended to withdraw appellate jurisdiction over interlocutory bankruptcy appeals by the roundabout method of reconferring jurisdiction over appeals from final bankruptcy orders.").

3. *The structure of the Sentencing Guidelines does not indicate that tax offenses cannot involve "fraud or deceit" for purposes of Subparagraph (M)(i)*

Petitioners also invoke the Sentencing Guidelines as a kind of ersatz legislative history, claiming (Br. 28-32) that the Guidelines shed some light on Congress's decision to address tax-evasion offenses in a provision separate from the one addressing offenses involving "fraud or deceit." In their view, "[i]t is hardly coincidental that Congress used the precise language [that was] found in Part F of [Chapter 2 of] the Sentencing Guidelines ('fraud or deceit') in" Subparagraph (M)(i), even though "[t]ax offenses * * * are covered in Part T of [Chapter 2 of] the Guidelines." Pet. Br. 30-31.[16]

As an initial matter, to the extent petitioners imply (Br. 32 n.16, 32-33) that the Sentencing Guidelines treat convictions for "tax evasion" as being fundamentally different from convictions for "fraud," that idea is at war with their principal argument that Subparagraph (M)(i) should be construed to contain an implied exception for all tax crimes in order to avoid a redundancy between the reference to "fraud or deceit" in Subparagraph (M)(i) and the reference to Section 7201 offenses in Subparagraph (M)(ii).

In any event, there is no evidence that Members of Congress contemplated the Sentencing Guidelines in the course of deliberating about the amendments to the aggravated-felony definition. Cf. *District of Columbia*

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[16] Part F of Chapter 2 of the Guidelines, pertaining to "Offenses Involving Fraud or Deceit," was deleted effective November 1, 2001, and consolidated with provisions pertaining to theft and property destruction in Part B of Chapter 2, which is now entitled "Basic Economic Offenses." See Sentencing Guidelines App. C Supp., amend. 617.

v. *Heller*, 554 U.S. 570, 605 (2008) (noting that the statements that compose legislative history are "considered persuasive by some" in construing statutes "because the legislators who heard or read those statements presumably voted with that understanding"). Nor is there any reason to believe that the definition of aggravated felony is somehow patterned on the Guidelines. For instance, although the Guidelines group child pornography and prostitution offenses together (and did so when the INA's list of aggravated felonies was reordered in 1994), see Sentencing Guidelines Ch. 2, Pt. G (1994; 2010), the aggravated-felony definition addresses them in different provisions that are separated by one dealing with racketeering offenses. See 8 U.S.C. 1101(a)(43)(I), (J), and (K). Similarly, although petitioners attach significance to the fact that the Guidelines pertaining to tax crimes do not refer to the government as a "victim" (Br. 31), those same Guidelines also conspicuously fail to use the phrase "revenue loss" that appears in Subparagraph (M)(ii). Instead, they repeatedly refer to "tax loss," see Sentencing Guidelines §§ 2T1.1(a), 2T1.4(a), 2T4.1 (1994; 2010), which presumably would have been the statutory phrase if Congress had actually been tracking the Guidelines.

It is therefore unsurprising that the only decision petitioners cite (Br. 33) for the proposition that the Sentencing Guidelines may serve as evidence of congressional intent concerning the aggravated-felony definition rejected the argument that the Guidelines' treatment of an embezzlement offense as one involving "theft" would require that offense to be "treated as a theft offense under § 1101(a)(43)(G) rather than an offense involving fraud or deceit under § 1101(a)(43)(M)(i)." *Valansi* v. *Ashcroft*, 278 F.3d 203, 213 (3d Cir. 2002).

4. Principles of lenity do not call for a different result

Petitioners also invoke principles of lenity, contending that, even if the statutory text does not "clearly exclude[] convictions" under Section 7206(1) and (2) from the scope of Subparagraph (M)(i), the text is at least "unclear and ambiguous" and for that reason must be construed in their favor. Pet. Br. 41. That argument is unavailing.

a. Petitioners contend (Br. 42) that the mere existence of a "conflict of interpretation among and within" the lower courts requires this Court to resolve that conflict in their favor. But this Court has repeatedly rejected petitioners' approach, explaining that "[a] statute is not '"ambiguous" for purposes of lenity merely because' there is 'a division of judicial authority' over its proper construction." *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)); see also *United States* v. *Hayes*, 129 S. Ct. 1079, 1083, 1088-1089 (2009) (noting division among circuits, and within the court of appeals' decision, before finding the rule of lenity inapplicable in a criminal case).

Nor is a different result warranted in the immigration context simply because one construction of a statute will result in an alien's removal from the United States. That is illustrated by *Nijhawan*, which, like this case, involved a disagreement among circuits, see 129 S. Ct. at 2298, as well as a divided panel of the court of appeals, see *Nijhawan* v. *Attorney Gen.*, 523 F.3d 387, 399-406 (3d Cir. 2008) (Stapleton, J., dissenting), aff'd, 129 S. Ct. 2294 (2009). In *Nijhawan*, the petitioner and his amici—who included petitioners here—expressly invoked principles of lenity. See Pet. Br. at 48-50, *Nijhawan*, *supra*; Amicus Br. of Akio Kawashima and Fusako Kawashima at 11-12, *Nijhawan*, *supra*. This Court,

however, adopted the government's reading of the statute (which had been rejected by some courts of appeals, see 129 S. Ct. at 2298), and it affirmed the decision allowing Nijhawan to be removed. See *id.* at 2304.

b. Even in the criminal context, the threshold question for purposes of applying principles of lenity is whether there is a "grievous ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).[17] Here, there is no such grievous ambiguity or equipoise. Instead, as discussed above, the plain meaning of Subparagraph (M)(i) encompasses petitioners' offenses, and the canons of construction that petitioners invoke do not warrant their inference that the

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[17] Petitioners contend (Br. 46) that "the criminal rule of lenity" is applicable here because the definition of aggravated felony "has both immigration and criminal law implications." In both of the cases they cite, however, the relevant components of the aggravated-felony definition were incorporated directly from definitional sections of the federal criminal code. See *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010) (noting that "the critical language appears in a criminal statute, 18 U.S.C. 924(c)(2)"); *Leocal*, 543 U.S. at 11 & n.8 (construing the definition of a "crime of violence" in 18 U.S.C. 16, "a criminal statute"). Here, by contrast, the relevant definition is not a criminal statute; it is entirely contained in Section 1101(a)(43)(M), in the INA itself. Moreover, the fact that the definition of aggravated felony could be of collateral relevance in a subsequent prosecution for illegal reentry after removal, see 8 U.S.C. 1326, does not detract from the definition's principal purpose of providing a basis for civil removability determinations. In an analogous context, the Court has held that agency interpretations issued in the administration of a regulatory statute are entitled to deference even though the statute may sometimes be enforced in criminal prosecutions. See *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 703, 704 n.18 (1995); see also *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (granting *Chevron* deference to an SEC rule in a criminal case).

mention of one offense in Subparagraph (M)(ii) implicitly withdrew all other "tax crimes" from the definition of aggravated felony. Thus, even if the Court were to conclude that the statute is not "crystalline," it is still possible "to make far more than a guess as to what Congress intended," which prevents the rule of lenity from "apply[ing] in [petitioners'] favor." *DePierre* v. *United States*, 131 S. Ct. 2225, 2237 (2011) (internal quotation marks omitted).

c. In a variation on their lenity argument, petitioners assert that any category of the aggravated-felony definition that is not "tied to specific statutory violations" (Br. 45) is intrinsically lacking in "clarity and certainty" and that "principles of due process and notice" (Br. 42) therefore preclude it from serving as the basis for removing an alien from the United States. But the opinions they cite (Br. 42-45) do not support that assertion.[18] And it is decisively refuted by *Nijhawan*, which affirmed a removal order predicated on a conviction for an aggravated felony as defined in Subparagraph (M)(i)—the very provision at issue here.

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[18] Justice Alito's concurring opinion in *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), described several reasons why it may be difficult to determine whether a particular offense is an "aggravated felony" or a "crime involving moral turpitude," *id.* at 1488-1491, but he did not point to the failure to cross-reference a specific statute, nor did he suggest that either definition should not be enforceable in a removal proceeding. Similarly, the dissenting opinions of Justices Scalia and Jackson that petitioners quote (Br. 44-45) involved different statutes altogether (and failed to persuade the Court not to enforce the statutes in question). See *Sykes* v. *United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (addressing the residual clause in the Armed Career Criminal Act); *Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (addressing provision making conviction of a "crime involving moral turpitude" a ground for deportation).

d. In any event, if the Court were to conclude that Subparagraph (M)(i) is ambiguous with respect to its applicability to "tax crimes," that still would not warrant the disposition that petitioners request (a determination that they cannot be deported, see Pet. Br. 47). Instead, the "proper course" would be to "remand to the agency" to "exercise[] its *Chevron* discretion to interpret the statute" in the first instance. *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (internal quotation marks omitted).[19]

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[19] The Board has not yet addressed, in a precedential opinion, whether federal tax crimes other than offenses described in Section 7201 may be aggravated felonies under Subparagraph (M)(i). It is, however, well established that the Board is entitled to deference in construing the INA. See, *e.g.*, *Negusie*, 129 S. Ct. at 1164, 1167 (finding statutory provision ambiguous, but remanding to the Board for it to address the question in the first instance, rather than adopting the narrowing construction offered by the alien); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (reversing decision of court of appeals for its failure to give *Chevron* deference to a decision of the Board). Of course, even if the Court did not follow its "ordinary rule" of remanding to allow the agency to speak in the first instance, *Negusie*, 129 S. Ct. at 1164, a judicial decision predicated on statutory ambiguity would not prevent the Board from later exercising its interpretive discretion in cases involving other parties. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys

SEPTEMBER 2011

APPENDIX

1. 8 U.S.C. 1101(a)(43) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

---

[5] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

---

[6] So in original. Probably should be followed by a semicolon.

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was

completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 8 U.S.C. 1227(a)(2)(A) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

* * * * *

3. 18 U.S.C. 371 provides in pertinent part:

Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

* * * * *

4. 26 U.S.C. 6531 provides in pertinent part:

Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the prepa-

ration or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

* * * * *

5. 26 U.S.C. 6663 provides:

Imposition of fraud penalty

(a) Imposition of penalty

If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

(b) Determination of portion attributable to fraud

If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes (by a preponderance of the evidence) is not attributable to fraud.

* * * * *

6. 26 U.S.C. 7201 provides in pertinent part:

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

7. 26 U.S.C. 7206 provides in pertinent part:

Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; * * *

* * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

REPLY BRIEF

No. 10-577

In The
Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

Edward O.C. Ord
Jenny Lin
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

Thomas J. Whalen*
**Counsel of Record*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin
& Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com

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REPLY BRIEF ON THE MERITS

Petitioners respectfully submit this Reply Brief in response to the Brief of Respondent, Eric H. Holder, Jr., Attorney General.

SUMMARY OF ARGUMENT

The issue in this case is whether the Petitioners' crimes of conviction under 26 U.S.C. § 7206[1] are among the serious "aggravated felonies" Congress designated as deportable crimes.

Petitioners contend that convictions for filing a false statement on a corporate tax return and assisting in the filing of such return in violation of § 7206 of the Internal Revenue Code ("IRC") are not aggravated felonies under 8 U.S.C. § 1101(a)(43)(M).[2]

On issues of statutory construction, the Court has held that courts should first look at the language of a statute to discern Congress' intent. If, upon that first look, the statute on its face is not immediately clear, courts should apply the canons of construction to try to arrive at Congress' intent.

In addition, the Court has held that courts should use every resource available to determine Congress' intent. "The rule of lenity applies only if, 'after seizing everything from which aid can be

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[1] Hereinafter, "§ 7206."

[2] 8 U.S.C. § 1101(a)(43)(M)(i) and (M)(ii) are hereinafter referred to as "(M)(i)" and "(M)(ii)," respectively.

derived,' . . . we can make 'no more than a guess as to what Congress intended.'" *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (*quoting United States v. Wells*, 519 U.S. 482, 499 (1997)).

In its Brief, the Government speculates what may have been in the mind of Congress in enacting (M)(i) and (M)(ii). However, speculation and conjecture are not aids this Court has ever relied upon.

Respondent also misstates the arguments of Petitioners. For example, Petitioners never stated or implied that (M)(i) is clear and unambiguous or that the Kawashimas' crimes of conviction were "within the *plain* meaning of subparagraph (M)(i)." Resp. Br. 13, 21 (emphasis added). To the contrary, Petitioners contend that (M)(i) is anything but "plain" or unambiguous.

Respondent mischaracterizes Petitioners' position in another regard. Respondent maintains that it is Petitioners' position that "the *mere existence* of a 'conflict of interpretation among and within' the lower Courts *requires* this Court to resolve that conflict in its favor." Resp. Br. 40 (emphasis added). Petitioners argued no such thing. What Petitioners wrote is basic common sense—that a conflict of interpretation among learned judges *suggests* that the statute is not all that clear. Petitioners cited *INS v. Errico*, 385 U.S. 214, 218 (1966) for what, it seemed, was this fairly obvious point. The Government, in effect, is arguing that the Court should ignore the fact that Circuit Judges on U.S. Courts of Appeals have strongly disagreed on

the meaning of (M)(i) and (M)(ii) but that two immigrants from Japan should have known what (M) means. Resp. Br. 42.

The Court should reject the Government's position. By applying time-honored canons of construction, and by using other reliable sources, Petitioners submit that (M)(i) was not intended by Congress to cover revenue loss offenses under the IRC, including, specifically, the Kawashimas' crimes of conviction under § 7206. Moreover, the Kawashimas' crimes of conviction under § 7206 did not contain, as an element of the crime, fraud or deceit.

I.

Applying the Canons of Construction, the Only Internal Revenue Code Offense Intended by Congress to be an Aggravated Felony is Tax Evasion Under 26 U.S.C. § 7201.

Petitioners contend that "revenue loss offenses" under the IRC, specifically §§ 7206(1) and (2), are not covered by (M)(i). Petitioners invoke the specific-general canon of construction employed by the Court to discern Congress' intent. In response, the Government has argued that (M)(i) is plain on its face and includes revenue loss offenses. Resp. Br. 12, 21. If (M)(i) did include IRC revenue loss offenses, (M)(ii) would be unnecessary. Logically, the specific would limit the general and revenue loss offenses such as those described in (M)(ii) would not to be included in (M)(i).

Respondent acknowledges the force of this canon by citing *Bloate v. United States*, 130 S. Ct. 1347, 1354 (2010) where the Court held that the "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." Resp. Br. 23. Because revenue loss offenses are specifically dealt with in (M)(ii), this rule compels the conclusion that revenue loss offenses like § 7201 and § 7206 are not included in (M)(i).

Congress has always classified revenue offenses like § 7201 and § 7206 separately from other crimes because of the different legislative goals of IRC sanctions.[3] This Court observed that "Congress has imposed a variety of sanctions for the protection of the system and the revenues." *Spies v. United States*, 317 U.S. 492, 495 (1943).

The Court in *Spies* stated that the purposes of these internal revenue sanctions were to protect incoming Government revenue from loss, to reimburse the Government for investigation expenses and to recoup revenue losses from defaulting taxpayers. *Id.* at 495 (*citing Helvering v. Mitchell*, 303 U.S. 391, 401, 402, 404-06 (1938)).

The Court in *Nijhawan* recognized Congress' separate classification of revenue loss offenses by referring to (M)(ii) as the "internal revenue provision."[4] *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009). IRC Title 26 revenue loss offenses are a different category of crimes than those contained in Title 18. Title 26 revenue loss offenses are directed to the protection of Government revenue.

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[3] The IRC criminal and civil sanctions are to protect revenue. *See Helvering v. Mitchell*, 303 U.S. 391, 401 (1938); *Spies v. United States*, 317 U.S. 492, 495 (1943).

[4] A criminal tax statute, which must be strictly construed, *Comm'r v. Acker*, 361 U.S. 87, 91 (1959), will have the same elements in a tax case as in an immigration case and does not take on new elements as it travels to immigration statutes in Title 8. *Cf. Powell v. Comm'r*, 791 F.2d 385, 389-90 (5th Cir. 1986).

M(ii) specifically covers tax evasion under § 7201. Because § 7201 includes all the statutory duties under the IRC, including breaches of duties under § 7206, it makes no sense that § 7206 and other revenue loss offenses were intended by Congress to be in (M)(i), while § 7201 alone was listed in (M)(ii).

Indeed, (M)(i) involves a different classification of offenses, namely victim crimes and not loss of revenue offenses. The legislative policy of recovery of revenue losses is not grounded on the notion that the Government is a "victim" but on the principle that taxpayers must fulfill their duty under our truthful, self-reporting system and that the Government's revenue must be safeguarded. *See Spies*, 317 U.S. at 497 (emphasizing that tax evasion is "the capstone of a system of sanctions which . . . [was] calculated to induce prompt and forthright fulfillment of every duty under the income tax law . . . .").

Nonetheless, the Government argues that tax-related offenses are in (M)(i), citing the conspiracy statute, 18 U.S.C. § 371,[5] to suggest that a substantive IRC revenue loss offense is also in (M)(i). Resp. Br. 27-29. The issue of whether a defrauding conspiracy under 18 U.S.C. § 371 will be included in (M)(i) stands on its own. Conspiracy to defraud the

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[5] The Government also cited to *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). Resp. Br. 28. There, the conviction was for the agreement with a purpose of impeding, in the future, the ability of the IRS to ascertain the correctness of the transactions at issue, which turned out to be legal. Klein was acquitted of the substantive § 7201 charges.

Government is the essence of the crime. If, as usually happens, like in *Klein*, the conspiracy count is joined with a tax evasion count, the tax evasion count would be within (M)(ii). A conspiracy to defraud the Government by overbilling, for example, might be captured in (M)(i).

The Government further argues that Congress intended the term "aggravated felony" to be interpreted expansively. Resp. Br. 36-37. There is no basis for the Government's claim that Congress intended to deport as many immigrants as possible by shoehorning every conceivable crime into one or another generic crimes under 8 U.S.C. § 1101(a)(43).

The Government also dodges the significance that (M)(ii) deals with "revenue losses to the Government" and (M)(i) deals with "losses to victims," offering a grammar lesson on "qualifying language" and a discussion of the holding in *Nijhawan* regarding the $10,000 threshold. Neither point has anything to do with Petitioners' contention that the different language used by Congress means that Congress intended a different category of offenses to be covered in (M)(ii).

When one simply reads the plain language of (M)(i) with (M)(ii), giving meaning to words like "victim" and "revenue loss to the Government," Petitioners submit that the ordinary reader would conclude that "revenue loss" offenses were not covered in (M)(i).

The Government speculates that Congress may have used the phrase "revenue loss" without intending to "giv[e] rise to the implication that the difference in terminology between (M)(i) and (M)(ii)"

has any significance, and that (M)(i) and (M)(ii) were intended to cover overlapping categories of loss. Resp. Br. 27. The Government concludes that in such a case, there would not be any reason for the specific "revenue loss to the Government." Resp. Br. 27-28. Exactly. The different terms, under basic canons of construction, must mean different things, specifically in this case, a different classification of crimes that Congress intended to cover in (M)(ii).

The Government also speculates that Congress may have "lacked confidence" that (M)(i) would not cover tax evasion in part because of *United States v. Scharton*, 285 U.S. 518 (1932). Resp. Br. 32. The Government misreads *Scharton*. In that case, the Court did not say that fraud was not contained in the tax evasion statute. The Court said quite the opposite:

> There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under § 1114(b), [the predecessor of the tax evasion statute] such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat.

Scharton, 285 U.S. at 521. Whatever one may say about *Scharton*, it has been changed by the amendment to the civil statute of limitations for assessment.

In sum, the Government speculates that Congress reviewed *Scharton*, misread it, and ignored subsequent developments, in particular the well-established doctrine that a conviction of tax evasion collaterally estops the tax evader from denying fraud in a civil assessment proceeding.

After contending that (M)(i) is clear and includes revenue loss offenses, the Government then incomprehensively argues that the specific-general canon is inapplicable "because the statute does not have a specific provision that deals with a whole class of 'tax crimes.'" Resp. Br. 23. This statement highlights the fact that Congress intended only one revenue loss offense to be an aggravated felony, namely § 7201.

Petitioners have invoked the rule against superfluities, arguing if (M)(i) covered tax evasion, (M)(ii) would be superfluous, which indicates Congress' intent that revenue loss offenses like § 7201 are not covered in (M)(i) and, instead, are solely covered in (M)(ii).

The Government argues, however, that statutory provisions which are superfluous or redundant can be ignored because Congress often enacts redundant provisions. Resp. Br. 29, 37. The Government again speculates that "out of an abundance of caution" Congress "may" have added (M)(ii) "even at the risk of creating a *minor* internal redundancy." Resp. Br. 32 (emphasis added). In this case, such speculative redundancy is not at all "minor."

The Court in *Nijhawan* disagreed, stating that (M)(ii) is not to be interpreted to achieve a pointless result. 129 S. Ct. at 2301. To avoid superfluity, the Government asserts that tax evasion does not "necessarily involve fraud or deceit" which would necessarily mean that a § 7201 conviction would not estop the taxpayer from contesting civil fraud. This would be a very positive development for convicted tax evaders.

The Government also speculates that the Court's decision in *Spies* may have raised "reasonable concerns" that "tax evasion" may be accomplished "in any manner." Resp. Br. 33. However, (M)(ii) clearly covers tax evasion, no matter how the tax evasion is committed.

In the end, the Government did conclude that tax evasion captures "'any conduct' that was fraudulent or deceitful." Resp. Br. 34. That being so, if such a crime involving fraud or deceit is covered in (M)(i), why (M)(ii)? That would be superfluous. To honor the canon against superfluity, (M)(i) cannot cover tax evasion.

The Government responds by offering a new canon of construction: that a statute should be construed in light of the possibility that courts might decide cases erroneously. Resp. Br. 35.

The Government further speculates that Congress might have had uncertainty about how (M)(i) would operate in the context of "tax offenses" under state law. Resp. Br. 35. Clearly, if a state or foreign conviction involved revenue loss to the Government based upon elements equivalent to tax

evasion, it would be an aggravated felony. The mistaken premise of the Government is that under state or foreign law a revenue loss offense involving fraud and deceit would be within (M)(i). It would not.

The Government states that (M)(ii) does not refer to the broader category of "tax crimes." Resp. Br. 31. Absolutely correct, for this reason, Congress designated only one IRC revenue loss offense, namely § 7201 in (M)(ii) as an aggravated felony. If Congress wanted to designate § 7206 as an aggravated felony, Congress could easily have done so in (M)(ii).

This Court instructed that courts should use every resource available to correctly construe a statute and discern the intent of Congress. The Government's Response is mostly grounded on speculation and conjecture. This Court has never held that speculation and conjecture are appropriate aids to construe a statute.

Petitioners invoke the Sentencing Guidelines because Congress delegated to the Commission the duty to classify crimes for sentencing purposes and because these guidelines can be a resource for discovering Congressional intent. The Government does not dispute the holding in *Valansi v. Ashcroft* that "courts may look to these sources [including the Sentencing Guidelines] to derive Congress' intent when passing the INA." 278 F.3d 203, 213 (3d Cir. 2002).

The Court is invited to look at Part F of Chapter 2 which was in effect when (M)(i) and (M)(ii)

were enacted into law. Part F dealt precisely with "offenses involving fraud or deceit" and based the sentencing for those offenses on damage to the "victims." The Commission did not include revenue loss offenses in Part F.

There is a separate classification for revenue loss offenses in Part T. The Government attacks Petitioners' point on the basis that Part T "conspicuously fail[s] to use the phrase 'revenue loss'" and uses the term "tax loss." Resp. Br. 39. This ethereal observation hardly addresses the fact that the Guidelines classify separately fraud and deceit offenses and revenue loss offenses consistent with Congress' intent to deter attacks on the Government's revenue.

For all of these reasons, Petitioners respectfully urge the Court to conclude that the Kawashimas' crimes of conviction under § 7206 were not aggravated felonies under (M)(i).

II.

The Petitioners' Crimes of Conviction are not Covered in (M)(i) Because Neither Fraud Nor Deceit is an Element of the Offense.

Petitioners maintain that the revenue loss offenses of which they were convicted do not include either fraud or deceit as an element of the crimes of conviction. Accordingly, §§ 7206(1) and (2) are not "aggravated felonies." Pet. Br. 33-41.

The Government does not dispute that "fraud or deceit" are not elements of the crimes of conviction. Instead, the Government argues that convictions under § 7206 "necessarily involved deceit." Resp. Br. 17. The Government relies largely on *Black's Law Dictionary* which defines "deceit" as: "[a] false statement of fact made by a person knowingly or recklessly . . . with the intent that someone else will act upon it." Resp. Br. 17. The Government grounds its argument on the words "involving"[6] and "false." The Government then makes the leap that crimes that involve falsity

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[6] This Court has interpreted similar wording ("involves conduct that presents a serious potential risk of physical injury to another") in the context of the Armed Career Criminal Act, as requiring courts to look to the elements of the crime and not the specific conduct of the offender. *James v. United States*, 550 U.S. 192, 202 (2007).

necessarily "involve deceit" and, therefore, are covered in (M)(i), all the while conceding that § 7206 does not contain the element of fraud or deceit and that the Government does not have to prove fraud or deceit to obtain a conviction under § 7206.[7] Resp. Br. 19.

This Court and the BIA have made it absolutely clear that the elements of the crimes of conviction control the determination of whether a crime is an "aggravated felony." *See, e.g., Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2587 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004); *In re Babaisakov*, 24 I. & N. Dec. 306, 312 (BIA 2007) (*citing In re Pichardo*, 21 I. & N. Dec. 330, 335 (BIA 1996)). The determination of whether a crime is an aggravated felony does not hinge on what is said in *Black's Law Dictionary*, however reputable that publication may be.

Moreover, for a § 7206 conviction, the Government did not have to prove that the Kawashimas intended the Government to "act upon" the misstatements, as the Government's own "definition" requires. That is a key distinction between perjury offenses and crimes of "deceit." *See, e.g., United States v. Griffin*, 524 F.3d 71, 81 (1st Cir. 2008) ("[I]ntent to induce government reliance on a false statement or to deceive the government is not an element of 26 U.S.C. § 7206(1).").

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[7] In fact, fraud is often equated with deceit. *See, e.g., United States v. Olson*, 576 F.2d 1267, 1271 (8th Cir. 1978) ("Information is fraudulent if it was falsely furnished with the intent to deceive.").

The only intent required for §§ 7206(1) and (2) convictions is "willfullness." *United States v. Bishop*, 412 U.S. 346, 350 (1973). The Government has avoided *Bishop*, which holds that "willfully" is the "voluntary, intentional violation of a known legal duty." *Id.* "Willfully," as defined by the Court in *Bishop*, is completely different from the "deceit" defined by the Government.

The Government also takes issue with Petitioners' citation to *Wright v. Comm'r*, 84 T.C. 636 (1985), as standing for the proposition that a conviction under § 7206(1) does not collaterally estop the taxpayer from disputing fraud, which is a required element of 26 U.S.C. § 6653(b)(1). Resp. Br. 20. The Government argues that "the reason a taxpayer in a civil tax fraud suit is not estopped by a Section 7206(1) conviction from denying an 'underpayment * * * due to fraud' is that it would not have been necessary to prove an underpayment . . . ." Resp. Br. 20. The Government, however, misconstrues the holding in *Wright*. While the Government is correct that "underpayment" is not required in § 7206(1) cases, the Court in *Wright* specifically addressed § 7206(1) cases in which there was an underpayment and still held that a defendant is not collaterally estopped from attacking the basis of said underpayment as being "due to fraud:"

> Because the attempt to evade tax is the gravamen of fraud (*see, e.g., Hebrank v. Commissioner, supra* at 642), we concluded in *Amos* that a taxpayer convicted under section 7201 of having attempted to evade or defeat

> a tax for a taxable year is collaterally estopped from denying under section 6653(b) that part of his underpayment for the same year was "due to fraud." . . . However, to have held, as we did in *Considine v. Commissioner*, *supra*, and *Goodwin v. Commissioner*, *supra*, that a conviction for "willfully" making a false statement in an income tax return within the meaning of section 7206(1) estops a taxpayer from denying that any underpayment made for the year of the return was "due to fraud" misapplies the principle of collateral estoppel and creates the semantic confusion warned against in *United States v. Bishop*, *supra*.

Wright, 84 T.C. at 642-43. The ability of the defendant/taxpayer to challenge the "fraud" element in a § 6653 case has nothing to do with underpayment, but has everything to do with the fact that the "intent to evade" (the fraud element found in § 7201 cases) is not present in § 7206 cases.

The Commissioner of Internal Revenue acquiesced in *Wright*. *Comm'r Acquiescence*, 1988–2 CB 1. Courts in subsequent years have consistently followed this holding. *Cox v. Comm'r*, T.C.M. 1985-324, 1985 Tax Ct. Memo LEXIS 307, at *26-27 (July 2, 1985); *McGowan v. Comm'r*, 187 Fed. App'x 915, 917 (11th Cir. 2006).

The idea that § 7206(1) necessarily involves fraud or deceit is contrary to settled precedent. If that were true, a § 7206(1) conviction *would*

collaterally estop the taxpayer from denying civil fraud, which is not the law. *See Considine v. United States*, 683 F.2d 1285, 1287 (9th Cir. 1982); *Wright*, 84 T.C. at 642-643; *Ochs v. Comm'r*, T.C.M. 1986-595, 1986 Tax Ct. Memo LEXIS 15, at *9 (Dec. 22, 1986); *Franklin v. Comm'r*, T.C.M. 1993-184, 1993 Tax Ct. Memo LEXIS 181, at *24 (Apr. 26, 1993).

In this same vein, it should be noted that 26 U.S.C. § 6501(c)(1) provides specifically that there must be an "intent to evade tax" in addition to the filing of a false or fraudulent return for the exception to the three-year statute of limitations for assessment to apply. A § 7206(1) conviction, without more, has been held not to extend the general three-year statute of limitations for assessments and collection under § 6501(c)(1). *See, e.g., McGowan*, 187 Fed. App'x at 916-18 (holding that taxpayer's convictions under §§ 7206(1) and (2) did not establish intent to defraud for § 6501(c)(1) purposes). Under the Government's position, Congress would not have had to add "the intent to evade language" to a § 7206(1) violation to suspend the statute of limitations.

The Government also relies upon *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 173 (5th Cir. 2008) and *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) for the proposition that § 7206 convictions involve "fraud or deceit." Resp. Br. 19. The alien in *Arguelles-Olivares*, however, did "not contest that his conviction under [Section 7206(1)] 'involves fraud or deceit'" (526 F.3d at 183-84 (Dennis, J., dissenting)) and the Court in *Ki Se Lee* did not address the question as it found no need

based on its holding related to statutory construction (368 F.3d at 224). Accordingly, these cases do nothing for the Government.

In his amicus brief, Commissioner Walters offers another analogy which supports Petitioners' argument. Commissioner Walters notes that 18 U.S.C. § 1001 is similar to § 7206(1) and criminalizes the willful making of a false material statement to the Government. Walters Br. 7-8. Like § 7206(1), 18 U.S.C. § 1001 contains no language requiring proof of any additional element, such as an intent to deceive or defraud. In *United States v. Yermian*, the Court held 18 U.S.C. § 1001 "contains no language suggesting any additional element of intent such as a requirement that false statements be knowingly made" with an intent to deceive. 468 U.S. 63, 68 (1984) (citation omitted). As Commissioner Walters points out, it would be a disaster for U.S. tax enforcement if the Government now had to prove fraud or deceit in § 7206 cases. Walters Br. 18-21.

In *Bridges v. United States*, the Court addressed a similar issue. 346 U.S. 209, 222 (1953). The Court held:

> The offense there charged is that Bridges knowingly made a false material statement in a naturalization proceeding. In that offense, as in the comparable offense of perjury, fraud is not an essential ingredient. The offense is complete without proof of fraud, although fraud often accompanies it. . . . Under the doctrine of these cases, the suspension

> does not apply to the offense charged, unless, under the statute creating the offense, fraud is an essential ingredient of it. . . . Nothing in § 346 (a)(i) makes fraud an essential ingredient of the offense of making a false material statement in a naturalization proceeding.

Id.; *see also Taylor v. United States*, 495 U.S. 575, 600, 602 (1990) (construing a federal sentencing enhancement statute and holding that the sentencing court should "look only to the fact of conviction and the statutory definition of the prior offense").

As these cases show, neither fraud nor deceit is an essential element of § 7206, and it does not need to be proved by the Government.

Additionally, the Government fails to acknowledge that this case is the logical extension of *Nijhawan*. The issue whether the $10,000 threshold was an *element* of the crime was a core inquiry of the Court. Referring to (M)(ii), the Court stated: "There is no offense 'described in § 7201 of Title 26' that has a specific loss amount as an element." *Nijhawan*, 129 S. Ct. at 2301. Thus, if the revenue loss was an element, the tax evasion provision would be "pointless." *Id.*

The Government in *Nijhawan* had argued that the sole purpose of the "aggravated felony" inquiry is "to ascertain the nature of a prior conviction." *Id.* at 2303. In this case, the "nature" of

§ 7206 is perjury, and neither fraud nor deceit is an element of the crime.

Finally, the Government cites its Criminal Tax Manual as supporting its position that a § 7206 conviction involves deceit based upon the words of "false," "materiality," and "willfulness." Resp. Br. 18. The Government is wrong. An examination of the Department's Manual (as well as the IRS Office of Chief Counsel Tax Division Tax Crimes Handbook (IRS, Office of Chief Counsel, *Tax Crimes Handbook*, 62-80 (2009)), specifically, its extensive discussion of § 7206, is instructive. Resp. Br. 28. The elements are listed, and neither fraud nor deceit is included. The Government has never before asserted that fraud or deceit was either an element of a § 7206 crime or that fraud or deceit is "necessarily" implied or needs to be proven.

The Government is now saying, apparently, that even if fraud or deceit is not alleged or proved, the element of fraud or deceit can be *implied* from filing a materially false tax return. Even before this country was founded and its Courts adopted the common law, fraud and deceit, under *any* circumstance, had to be proved, not "implied."

In summary, neither fraud nor deceit is an element of the Kawashimas' crimes of conviction. The crimes of conviction, therefore, are not covered in (M)(i), and, as such, § 7206 convictions are not aggravated felonies.

III.

The Rule of Lenity Should be Applied in this Case if the Court Finds (M) to be Ambiguous Because the Rule Applies in Both Immigration and Criminal Cases.

The Government argues that the rule of lenity should apply only in criminal cases. Resp. Br. 40-41. The Court has held otherwise: "[Courts must] construe any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

The principle motivating the Court to apply the rule of lenity in criminal and deportation cases is fairness. Lenity is grounded on principles of due process fair notice—that a person should not suffer imprisonment or banishment on the basis of a vague or ambiguous statute. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

If the Court finds (M) to be ambiguous, the Court should apply the rule of lenity in favor of the Kawashimas.

IV.

Aligned with the Rule of Lenity, Constitutional Due Process Fair Notice Requires that Deportation may not be Ordered in a Proceeding that is Based on the Interpretation of an Ambiguous Statute.

Subsection (M) is vague and failed to provide fair notice that Kawashimas' crimes of conviction were deportable offenses. The Government states incorrectly that *Nijhawan* decisively rejected the applicability of due process fair notice principles. Resp. Br. 42. This issue, however, was not raised or considered in *Nijhawan*.

This Court has recently considered the issue of due process fair notice with respect to the vague wording of the mail and wire fraud statutes. *See Skilling v. United States*, 130 S. Ct. 2896, 2929-35, 2939 (2010) (Scalia, Thomas, and Kennedy, JJ., concurring) (agreeing with the majority's conclusion on the ground that the wording "the intangible right of honest services" was vague and violated due process fair notice, outlining in detail the differences of opinions in conflicting circuit cases interpreting this phrase); *Black v. United States*, 130 S. Ct. 2963, 2970-71 (2010) (Scalia, Thomas and Kennedy, JJ., concurring) (stating that the honest services wording was vague and violated due process fair notice).

Due process requires that a person of ordinary intelligence be given notice of what constitutes prohibited conduct and the consequences of that

conduct. *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *see also* Pet. Br. 46 (cases cited therein).

Subsection (M) as enacted does not give such sufficient notice. Persons of ordinary intelligence are not put on fair notice that they have committed and pled guilty to deportable offenses.[8] If anything, (M)(ii) put the Kawashimas on notice that the revenue offenses to which they pled were not deportable offenses.

Due process fair notice issues have arisen repeatedly in tax cases due to the uncertainty and complexity of the tax statutes. Ignorance or mistake of the law is recognized as a defense to civil/criminal tax penalties due to that complexity. *See Cheek v. United States*, 498 U.S. 192, 199-200 (1991). This is an exception carved out of the deeply rooted general rule that ignorance or mistake of the law is no defense. *Id.*

In *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), the court reversed convictions for tax fraud and conspiracy because of the "unsettled legality" of the tax shelter scheme and the lack of

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[8] Linda Greenhouse has written that the subsection is vague. *See* Linda Greenhouse, *Activists by Invitation*, N.Y. Times, June 15, 2011, *available at* http://opinionator.blogs.nytimes.com/2011/06/015/activists-by-invitation/?pagemode=print (stating with respect to subsection (M), "Is that clear? Not to me, and I've read it at least 20 times. Do both clauses apply to tax crimes, or does only the second, which would suggest that the only deportable tax crime is evasion.").

any relevant precedent and regulations and other guidance denied "fair notice." *Id.* at 1428-29.

In Petitioners' case, there was no guidance in the form of case law that their convictions under § 7206 constituted deportable aggravated felonies within (M). The only regulation issued by the DHS did not clarify what conduct is deportable under (M). *See* 8 C.F.R. § 1.1.

If a statute prescribing a civil and/or criminal consequence does not clearly define the conduct subject to such consequence, an agency may not seek to pioneer the law of an ambiguous statute and/or regulation in a criminal prosecution or civil enforcement action and then apply the newly pioneered law to the defendant of that particular enforcement action. *See United States v. Hitachi Am. Ltd.*, 172 F.3d 1319, 1330-31 (Fed. Cir. 1999); *United States v. Ford Motor Co.*, 463 F.3d 1267, 1275-6 (Fed. Cir. 2006). This is precisely what occurred in this case.

The Government dismisses Justice Alito's concurring opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488-1491 (2010) and the dissenting opinions of Justice Scalia in *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) and of Justice Jackson in *Jordan v. DeGeorge*, 341 U.S. 223, 243 (1951), Resp. Br. 42 n.18, attempting to distinguish those opinions while ignoring the essence of the Justices' concerns—that due process and fair notice are denied where criminal defendants are convicted and immigrants are deported on the basis of vague and unclear statutes.

On the basis of lack of fair notice, and as a matter of due process, the orders of deportation in this case should be set aside.

V.

Chevron and its Progeny do not Mandate Remand Because it is the Role of the Courts to Resolve Questions of Statutory Construction.

The Court has held that matters of statutory construction are for the courts to resolve, not agencies. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). There is no basis for finding that Congress delegated to the Attorney General the authority to define what particular crimes constitute aggravated felonies.

It is true that *Chevron* deference may be applicable when Congress clearly delegated to the Attorney General the authority to make a determination in the implementation of a statute. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) ("[W]ithholding does not apply, and deportation to the place of risk is authorized" if the Attorney General *determines* that there are serious reasons for considering that the alien has committed a serious nonpolitical crime . . . 8 U.S.C. § 1253 (h)(2)(c).") (emphasis added). Similarly, in *Negusie v. Holder*, the Court held that whether an alien who was compelled to assist in the persecution of prisoners of war can be eligible for asylum or withholding of removal is a policy issue that

Congress put in the hands of the BIA in light of its expertise and experience. 555 U.S. 511, 517 (2009).

Those cases did not involve statutory construction but rather implementation of a provision of a statute delegated by Congress to the Attorney General.

The issue in this case is one of pure statutory construction. The suggestion that Congress delegated to the Attorney General, the chief criminal enforcement official of the Government, through the BIA, the discretion to define, and subsequently enforce, what crimes are deportable is not sustainable.

The Government's broad argument that the determination of what crimes are aggravated felonies should be left to the agency, when taken to its logical conclusion, would result in the elimination of the rule of lenity in deportation cases. As shown above, however, the rule continues to be applicable.

Although there are places where Congress delegated to the Attorney General and the BIA interpretative authority in their implementation of the Immigration and Nationality Act which merits *Chevron* deference, there is no such delegation in the case at bar. Congress did not delegate to the Attorney General the authority to define what crimes are aggravated felonies. As such, remand to the BIA is improper.

CONCLUSION

The judgment of the Ninth Circuit should be reversed with instructions to dismiss the deportation proceedings.

October 28, 2011

Respectfully submitted,

Thomas J. Whalen*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin &
Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
* *Counsel of Record*

Edward O.C. Ord
Jenny C. Lin
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-577

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IN THE

Supreme Court of the United States

AKIO KAWASHIMA, ET UX.,

Petitioners,

—v.—

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ASIAN AMERICAN JUSTICE CENTER; ASIAN LAW CAUCUS; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; ASIAN PACIFIC AMERICAN LEGAL CENTER; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; DEFENDING DISSENT FOUNDATION; MUSLIM LEGAL FUND OF AMERICA; NATIONAL COUNCIL OF LA RAZA; NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION; SOUTH ASIAN AMERICANS LEADING TOGETHER; AND SOUTHEAST ASIA RESOURCE ACTION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

IRA J. KURZBAN
Counsel of Record
KURZBAN, KURZBAN, WEINGER, TETZELI & PRATT P.A.
2650 S.W. 27th Avenue,
2nd Floor
Miami, Florida 33133
(305) 444-0060
ira@kkwtlaw.com

Attorneys for Amici Curiae

Library of Congress
Law Library

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INTERESTS OF *AMICI CURIAE*

An "aggravated felony" pursuant to the Immigration and Nationality Act ("INA") results in the most severe consequences possible under our nation's immigration laws. The disabilities that emanate from conviction of an aggravated felony include: (1) permanent removal; (2) ineligibility for asylum, withholding of removal, and temporary protected status; (3) an absolute bar to naturalization; (4) disqualification from discretionary cancellation of removal and various waivers of inadmissibility; (5) mandatory detention; (6) expedited removal; and (7) a bar to voluntary departure.

Some of the individuals who are most severely affected by the deportation of people deemed aggravated felons include the United States citizen parent who is left behind without economic provision, as well as United States citizen children. Moreover, longtime lawful permanent residents who barely remember their "country of origin" are separated from their support network here in the United States, the only nation they can properly call "home." Many of the children separated from their parents are United States citizens who have never stepped foot in their parents' native countries, nor even speak the native tongue. These children are forced to make the unenviable choice between deporting themselves to remain with their parents, or living a life of isolation here in the United States devoid of family.

Further, those deemed aggravated felons are eligible to be deported to nations facing civil war, famine, flooding, earthquakes, political revolution,

and economic depression after their applications for asylum and temporary protected status are rejected without consideration of their "humanitarian purpose." Immigrants convicted of aggravated felonies are imprisoned through mandatory detention as they await deportation proceedings, sometimes spending years locked away thousands of miles from their families, most often without counsel.

While Congress clearly believes certain crimes are deserving of such categorically disastrous punishment, the Court should not expand the aggravated felony statute to include crimes beyond the explicit direction of the legislature. In this brief, *amici curiae* demonstrate the severity of the consequences that would follow if minor tax crimes qualify as aggravated felonies.

Amici curiae, the Asian American Justice Center, Asian Law Caucus, Asian Pacific American Labor Alliance, Asian Pacific American Legal Center, Catholic Legal Immigration Network, Inc., Defending Dissent Foundation, Muslim Legal Fund of America, National Council of La Raza, North American South Asian Bar Association, South Asian Americans Leading Together, and Southeast Asia Resource Action Center respectfully submit this brief in support of petitioners Akio and Fusako Kawashima.[1]

The Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, non-

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

partisan organization working to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including immigration and immigrants' rights. AAJC is committed to defending the rights of all Americans, including immigrants, communities of color, and other minorities. AAJC joins this brief because the expansion of the definition of "aggravated felony" in recent years has devastating impacts on Asian American immigrants, often longtime lawful permanent residents, who face the real world consequences of being permanently separated from their families.

Founded in 1972, the Asian Law Caucus ("ALC") is the nation's oldest legal organization defending the legal and civil rights of Asian American and Pacific Islander communities. ALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center, and Asian Pacific American Legal Center. The Immigrants' Rights Project at the Asian Law Caucus provides direct representation to individuals facing detention and deportation before the Immigration Courts, the Board of Immigration Appeals and the United States Court of Appeals for the Ninth Circuit. We seek to uphold the rights of detainees and to protect those who face removal.

The Asian Pacific American Labor Alliance ("APALA"), AFL-CIO, is the first and only national organization of Asian Pacific American union members and allies. It organizes and works with

Asian Pacific American workers, many of them immigrants, to build the labor movement and address exploitative conditions in the workplace. APALA has a longstanding interest in protecting the rights of Asian Pacific Americans and has participated in a number of amicus briefs before the courts on these issues.

The Asian Pacific American Legal Center ("APALC"), a member of the Asian American Center for Advancing Justice, was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific Islander community. APALC provides direct legal services and uses impact litigation, public advocacy, and community education to obtain, safeguard, and improve the civil rights of the Asian American and Pacific Islander (AAPI) communities. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work span a range of issues from immigration, workers' rights, and health access to anti-discrimination, language rights and voting rights. APALC has long advocated for the fair and just administration of the nation's immigration laws, focusing particularly on the needs of AAPI immigrants.

The Catholic Legal Immigration Network, Inc. ("CLINIC"), a national religious organization created in 1988 by the United States Conference of Catholic Bishops, is the largest network of immigration legal service providers in the country, assisting more than 600,000 people annually. Concerned with justice, mercy, and redemption, we are alarmed by courts applying a wider interpretation of the term "aggravated felony" than Congress intended. Such

misinterpretations have severe consequences, including the penalizing of lawful permanent residents and their family members, many of whom are U.S. citizens and form the backbone of our economic, social, and religious communities.

The Defending Dissent Foundation ("DDF") was founded in 1960 to protect and defend the civil rights and civil liberties of citizens and non-citizens in the United States. As an advocacy organization, DDF seeks to promote the political and due process rights of immigrants, opposing legislation and policies that restrict those rights.

The Muslim Legal Fund of America ("MLFA") is a non-profit public cause charity that supports legal cases involving Muslims which impact civil rights and liberties in America. The Supreme Court's ruling in this case must not punish immigrants and their families in a disproportionate manner. Because the outcome will directly affect immigrant communities, MLFA members have a concerted interest in the fair resolution of the issues on appeal.

The National Council of La Raza ("NCLR") – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR works through two primary, complementary approaches: (1) Capacity-building assistance to support and strengthen Hispanic CBOs – especially those that serve low-income and disadvantaged Latinos; and (2) Applied research, policy analysis, and advocacy to encourage adoption of programs and

policies that equitably serve Hispanics. NCLR believes that the consequences of an aggravated felony conviction have a severe impact on many Latinos, including immediate relatives who are United States citizens and longtime lawful permanent residents.

The North American South Asian Bar Association ("NASABA") is the umbrella organization for 27 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. Within the United States, NASABA takes an active interest in the legal rights of South Asian and other minority communities, including immigration rights.

South Asian Americans Leading Together ("SAALT") is a national nonpartisan non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. SAALT's strategies include conducting public policy analysis and advocacy; building partnerships with South Asian organizations and allies; mobilizing communities to take action; and developing leadership for social change. As a community that is predominantly foreign-born, South Asians are affected by the country's immigration policies, including the expansion of the definition of "aggravated felony" in recent years. SAALT joins this brief because we are concerned about many minor offenses that are included in its scope and the devastating impact that resulting deportation has on community members.

The Southeast Asia Resource Action Center ("SEARAC") is a national non-profit organization advancing the interests of Southeast Asian

Americans through leadership development, capacity building, and community empowerment. SEARAC has been a strong advocate on immigrant rights, particularly deportation and its impact on Southeast Asian American and refugee families. Immigration consequences resulting from criminal convictions, even minor ones, have been especially harmful as they can result in life-long removal. For many, the life-long consequence is disproportionate and takes no account of other life circumstances.

BACKGROUND

While *amici* do not believe tax reporting offenses should go unpunished, Petitioners have already been punished by the criminal courts. In considering whether he should be deported from the United States, the proportionality of the crime and punishment must be taken into account. As explicated below, the consequences of defining a crime as an aggravated felony are numerous and alarmingly severe. The question is not whether such activity should be illegal, but rather whether Congress mandated that this conduct receive the harshest, most destructive penalty permissible under the immigration laws.

8 U.S.C. § 1101(a)(43)(M) states:

> [An aggravated felony is] an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in § 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which

the revenue loss to the Government exceeds $10,000.

Additionally, Petitioners were charged pursuant to 26 U.S.C. § 7206, which states:

> Any person who –
>
> (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> (2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document....
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3

years, or both, together with the costs of prosecution.

Petitioners pled guilty under section (1) of this statute for the false filing of his tax returns, namely underreporting income. While section (2) explicitly establishes the intent elements of fraud and deceit, section (1) in contrast remains silent. Despite the language requiring a demonstration of fraud or deceit to qualify under the aggravated felony provision quoted above, 8 U.S.C. § 1101(a)(43)(M), an Immigration Judge and subsequent adjudicators have ruled the Kawashimas deportable for having been convicted of an aggravated felony. The instant case involves a judicial choice between applying the directive of Congress as established through the language of the statute, or expanding the definition of aggravated felony to include such minor tax offenses as underreporting income to the IRS.

SUMMARY OF ARGUMENT

The aggravated felony designation is among the most severe penalties handed down by the United States government, and is unrivaled in its caustic power in the immigration context. Those found guilty of qualifying crimes face immediate and immutable deportation, extended nondiscretionary detention, summary and complete dismissal of countervailing equities, and rejection of United States protection during times of widespread hysteria, natural disaster, war, and/or government persecution in the "country of origin."

Despite these devastating consequences for such a conviction, it is often those left behind in the United States who suffer most. Those aliens deported are frequently fathers, mothers, spouses, children, and siblings. They are not unattached violators of American law, but rather integral members of families long-settled here in the United States. Many American families are a mix of citizens and noncitizens with varying degrees of social ties and relationships. Deportation frequently rips a parent away from his or her child, separates spouses, or ships a child back to a nation in which he or she has no connections, nor can even speak the language vital for daily tasks.

As with any criminal sentence, the burden of an aggravated felony conviction falls on the violator's family, friends, and community. However, what makes the aggravated felony so much more destructive is the permanent nature of its penalties. When the government deports a U.S. citizen child's resident parent, it breaks apart a family forever, and leaves another American youth to fend for himself or herself without a parent's guidance. This phenomenon is even more pronounced in lower-income families who cannot afford to travel back and forth between the United States and the country of origin. Children in such families are effectively sentenced with their parents. They frequently face the choice of self-deporting, or leaving behind the American dream and their life in the United States.

The history of how "aggravated felonies" evolved shows that Congress has consistently intended a narrow construction of the definition by specifying exactly which crimes would qualify for such a designation. The statute as presently written

includes a large number of crimes of varying severity. Congress has repeatedly updated the list, amended prior declarations, and emphasized mens rea and specific conviction detail when new qualifying crimes were added. Congress has drafted the aggravated felony definitions with great specificity, eliminating any doubt as to the intended inclusion or exclusion of particular offenses.

ARGUMENT

I. The History Of How Aggravated Felonies Evolved Demonstrates Congress's Intent To Limit Their Definition To Specific Designated Crimes

Aggravated felonies evolved in a manner which demonstrates that Congress intended to limit their definition only to crimes specifically denominated as such under the INA. Rather than provide a broad, open-ended framework describing criminal activity such as "crimes involving moral turpitude"[1] or a "violation of...a regulation relating to a controlled substance,"[2] Congress specifically defined and thus limited which crimes would be included within the definition of aggravated felony.

Congress has continued to refine the definition of "aggravated felony" by making amendments to the

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[1] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i); INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).

[2] INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B); INA § 212(a)(2)(A)(i), (C); 8 U.S.C. § 1182(a)(2)(A)(i), (C).

INA.[3] In each successive amendment to the aggravated felony provision, Congress has deliberately cabined the designation to a specific set of crimes.[4] The increasingly precise definition of aggravated felonies demonstrates Congress's attempt to make clear to courts and enforcement agencies exactly which crimes qualify, with a commensurate specificity of statutory language.

Had Congress intended for an expansive statute with room for judicial interpretation and agency application, it would have employed a more generalized term such as "crimes involving moral turpitude" ("CIMT").[5] Courts have been provided much interpretive authority in applying the CIMT designation, precisely because Congress has not explicitly enumerated qualifying crimes.[6] Had

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[3] The current definition is found at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

[4] *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (ADAA) (establishing an additional ground of deportability for crimes deemed particularly serious, specifically limited to murder, drug trafficking, and illegal firearm trafficking); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994) (expanding the definition of aggravated felony to specific offenses including burglary, fraud, deceit, and theft).

[5] The Board of Immigration Appeals (BIA) defines a CIMT as a crime that "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995).

[6] *See, e.g.*, *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989); *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980); *see also Marmolejo-Campos v. Holder*, 558 F.3d 903, 907-12 (9th Cir. 2009) (*en banc*) (*Chevron* deference applies to BIA's interpretation of CIMTs; citing other circuits).

Congress listed a number of specific crimes as CIMTs, as it did for aggravated felonies, courts would not have had to fill the interpretive void presented by the actual, elastic provision, instead limiting CIMTs' reach to specifically-cited crimes.

Similarly, in the context of controlled-substance-related offenses, courts have applied Congress's broad language in section 237(a)(2)(B)[7] in a proportionately broad manner.[8] Congress's choice not to enumerate the specific violations which qualify as offenses relating to controlled substances, has provided courts with a less constricted opportunity to interpret the statute. In contrast, an enumerated list of qualifying drug-related crimes would have restricted court action to those crimes that were denominated. With aggravated felonies, Congress's demonstrated desire to define the qualifying crimes with specificity mandates a restrictive reading of the provision to encompass only those crimes enumerated in the statute.[9]

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[7] "Any alien who at any time after admission has been convicted of a violation of...any law or regulation of a Sate, the United States, or a foreign country relating to a controlled substance...is deportable." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[8] *See, e.g., Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 120-22 (BIA 2009) (in context of inadmissibility for drug paraphernalia the BIA maintained a broad reading of "relating to" language); *Matter of Esqueda*, 20 I. & N. Dec. 850 (BIA 1994) (includes conviction for being under the influence of a drug, including any conviction lacking specific intent or mens rea); *see also Desai v. Mukasey*, 520 F.3d 762 (7th Cir. 2008) (distribution of a "look-alike substance" was a violation of state law relating to a controlled substance).

[9] *Carachuri-Rosendo v. Holder*, 560 U.S. ___, No. 09-60, 2010 WL 2346552 (June 14, 2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006).

The term "aggravated felony" in 1988 initially meant: "murder, any drug trafficking crime...or any illicit trafficking in any firearms or destructive devices...or any attempt or conspiracy to commit such an act, committed within the United States."[10] Today the definition is expanded, but more specific:

> (A) Murder, rape or sexual abuse of a minor; (B) illicit trafficking in a controlled substance...including a drug trafficking crime...; (C) illicit trafficking in firearms or destructive devices...or in explosive materials...; (D)...laundering of monetary instruments or...engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeded $10,000; (E)(i)...explosive materials offense; (ii)...firearms offenses; or (iii) [additional section of the United States Code similarly] relating to firearms offenses; (F) a crime of violence...for which the term of imprisonment is at least one year; (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year; (H) an offense...relating to the demand for or receipt of ransom; (I)...child pornography; (J) an offense...relating to racketeer influenced corrupt organizations or...gambling offenses for which a sentence of one year imprisonment or more may be imposed; (K)(i)...owning, controlling, managing or supervising of a

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[10] ADAA, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1998).

prostitution business; (ii)...transportation for the purposes of prostitution if committed for commercial advantage; or (iii)...peonage, slavery, and involuntary servitude; (L)(i)...gathering or transmitting national defense information...disclosure of classified information...sabotage [or] treason; (ii)...protecting the identity of undercover intelligence agents; or (iii) [similar provision] relating to protecting the identity of undercover intelligence agents; (M) an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii)...tax evasion in which the revenue loss to the government exceeds $10,000; (N)...alien smuggling [unless first offense and for purpose of aiding immediate family members]; (O) [previously deported aliens convicted of aggravated felonies]; (P)...falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument or...document fraud...for which the term of imprisonment is at least 12 months...; (Q)...failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more; (R)...commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year; (S)...obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year; (T)...failure to appear before a court pursuant to a court

> order to answer to or to dispose of a charge of a felony for which a sentence of two years imprisonment or more may be imposed; and (U) an attempt or conspiracy to commit an offence described in this paragraph. The term applies to an offense described in this paragraph whether in violation of a Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the last 15 years. Notwithstanding any other provision of the law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after [enactment].[11]

Congress has repeatedly dictated the precise scope of its immigration laws. The INA has been frequently amended, updating the list of predicate crimes and the consequences an aggravated felony conviction. With these amendments, Congress has not foreclosed judicial or agency interpretation, instead providing explicit directions about which crimes are included and which are excluded. This specificity supports a careful and narrow construction of the "aggravated felony" definition.

II. An Aggravated Felony Mandates Harsh Legal Consequences, And Therefore Necessitates Careful And Accurate Review Of A Conviction To Determine Whether An Individual Qualifies For Designation As An Aggravated Felon.

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[11] INA § 1101(a)(43), 8 U.S.C. § 1101(a)(43).

Congress considers aggravated felonies to be "the most serious offenses" covered by the immigration laws.[12] Legislation has reserved the most severe consequences for these offenses. At least nineteen disabilities or consequences result from a determination that an immigrant has been convicted of an aggravated felony.[13] These penalties range from permanent and irrevocable removal from the United States, to an absolute bar to fulfilling the necessary

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[12] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. REP. NO. 109-345(I), at 69.

[13] Mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(B), mandatory detention under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (1996), *see* IIRIRA § 303(b)(3)(A)(i), and expedited removal proceedings under 8 U.S.C. § 1228. Further, an alien may be disqualified from immigration-based benefits under 8 U.S.C. § 1229b(a) (cancellation of removal for permanent residents), 8 U.S.C. § 1229b(b) (cancellation of removal for non-permanent residents), former 8 U.S.C. § 1254 (suspension of deportation), former 8 U.S.C. § 1182(c) relief, 8 U.S.C. 1229c(a)(1) (pre-hearing voluntary departure), 8 U.S.C. § 1229c(b)(1) (post-hearing voluntary departure), 8 U.S.C. § 1158 (asylum), 8 U.S.C. § 1231(b)(3) (withholding), 8 U.S.C. § 1254a(c)(2) (Temporary Protected Status), and 8 U.S.C. § 1229b(b)(2) (benefits for victims of domestic violence). Other ineligibilities may be found at § 202(a)(1)(B) of the Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2160 (NACARA) (1997) (adjustment of status), § 203 of NACARA (special rule governing cancellation), and the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (adjustment of status). Moreover, an alien may be barred from demonstrating good moral character under 8 U.S.C. § 1101(f)(8), and thereby excluded from the benefits that require such a demonstration (e.g. naturalization). Finally, inadmissibility disabilities can be found at 8 U.S.C. §§ 1182(a)(9)(A) and 1182(h)).

criteria for naturalization, to exclusion from asylum eligibility, and include much more.

As one scholar put it, aliens convicted of aggravated felonies populate the eighth ring of immigrant hell, in a sinister allusion to Dante's legendary categorization.[14] Some of the most severe consequences of such a determination are:

A. Permanent Removal From The United States

The INA states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[15] The crime need not be committed within a certain number of years of establishing residence, or after being lawfully admitted. To the contrary, many immigrants are detained and placed in removal proceedings years after their admission, sometimes five, ten, or even twenty years later.[16] If removed on the ground of an aggravated felony conviction, they are ineligible for visas or admission to the United States; they become permanently excludable aliens pursuant to section 1182.[17]

Further, the length of the alien's residence in the United States plays no role in the determination

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[14] Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO IMMGR. L.J. 507, 519 (1997).

[15] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

[16] *See, e.g., Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (noncitizen deportable pursuant to a removal order issued more than twenty years after the predicate conviction).

[17] INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

of eligibility for permanent removal. While in many contexts, longstanding residence in the United States is an outstanding equity, Immigration Judges are barred from considering it as a mitigating factor when an immigrant is convicted of an aggravated felony.[18]

Lawful permanent residents are particularly likely to have strong family and community ties to the United States. Their extended residence in our country and often close intermingling with the larger community make removal a particularly serious punishment. Many of these noncitizens have spent their entire lives in the United States and do not even remember their time in the nation to which they are being deported.[19]

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[18] *See, e.g., Ayala-Chavez v. INS*, 944 F.2d 638, 640 (9th Cir. 1991) (LPR for 18-years deportable despite retaining the majority of his family in the U.S. and a minor daughter whom he supported both emotionally and financially).

[19] *See, e.g., Minto v. Mukasey*, 302 F. App'x 13 (2d Cir. 2008) (No. 05-0007-ag) (entered U.S. at age eight); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (Nos. 06-3987, 06-3994, 06-3476) (two LPRs, one in the U.S. since age nine, another in the U.S. for over 40 years); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008) (LPR since 1977, 30 years in U.S.); *Lopez-De Rowley v. INS*, 253 F. App'x 62, 64 (2d Cir. 2007) (LPR since 1970) *Knutsen v. Gonzales*, 429 F.3d 733, 735, 739-40 (7th Cir. 2005) (LPR since 1957); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Chang v. INS*, 307 F.3d 1185, 1187-90 (9th Cir. 2002) (LPR since 1975); *Valenzuela-Zamarano v. Ashcroft*, 11 F. App'x 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two); *Shurney v. INS*, 201 F. Supp. 2d 783, 786 (N.D. Ohio 2001) (entered U.S. at age three); *In re Collymore*, 2008 WL 4222241, *1 (BIA Aug. 28, 2008) (LPR since 1972); *In re Espinal*, 2008 WL 1734657, *1 (BIA Mar. 28, 2008) (LPR since 1973); *In re Flores-Gomez*, 2004 WL 2374449, *1 (BIA Jul. 27,

When an alien is convicted of an aggravated felony, he or she is not allowed to demonstrate the severe damage that will be done to those relatives who must often remain behind in the United States. Frequently it is United States citizens who are the most cruelly punished by the removal of a non-citizen.[20] Human Rights Watch has estimated that since 1997 nearly 1.6 million immediate family members currently living in the United States have been separated from their parents, children, and spouses because of deportation based on a criminal conviction.[21] There are countless examples of families who have been forced to confront this emotionally wrenching and economically devastating separation.[22]

2004) (admitted to U.S. in 1943); *Rodriguez-Diaz v. Holder*, 130 S. Ct. 3463 (2010) (entered U.S. at just six months).

[20] *See* Michael Falcone, *100,000 Parents of Citizens Were Deported Over 10 Years*, N.Y. TIMES, Feb. 14, 2009, A16.

[21] Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed By United States Deportation Policy* 6 (2007) (estimating that approximately 540,000 of those left behind were United States citizens by birth or naturalization); *See also* David Thronson, *Immigration Raids and the destabilization of American Families*, 43 WAKE FOREST L. REV. 391 (2008); NATIONAL COUNCIL FOR LA RAZA AND THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN (2007); Jo Ann Zuniga, *Deportation Rules Break up Families, INS Critics Charge*, HOUSTON CHRON., May 31, 1998, 29.

[22] *See, e.g., Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 172, 175-80 (5th Cir. 2008) (mother, two sisters, two brothers, and two U.S. citizen children); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (two U.S. citizen children; parents and siblings are citizens and LPRs); *Gerbier v. Holmes*, 280 F.3d 297, 300 (3d Cir. 2002) (mother, brother and three U.S. citizen children); *Gonzeles-Buitrago v. INS*, 5 F.3d 1495 (5th Cir. 1993) (U.S. citizen wife and daughter); *Gomez v. DHS*, No. 03-135 L,

B. Asylum, Withholding Of Removal, And Temporary Protected Status

Asylum is a discretionary form of relief that is available to those noncitizens who fear persecution upon returning to their country of origin. Such persecution must find its basis in "race, religion, nationality, membership in a particular social group, or political opinion."[23] Asylum will not only provide a basis to prevent deportation, but also may qualify a receiving alien for lawful permanent residence and/or citizenship.

A noncitizen convicted of an aggravated felony is statutorily barred from seeking asylum regardless of the severity of the threat faced upon return to the country of origin.[24] The INA bars asylum eligibility for those noncitizens "convicted by a final judgment of a particularly serious crime" that "constitutes a danger to the community of the United States."[25] Aggravated felonies are explicitly defined as qualifying "serious crimes" barring eligibility.

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*1 (D.R.I. 2003) (U.S. citizen grandparents, two citizen children); *Young v. Holder*, 130 S. Ct. 3455 (2010) (case involving LPR with U.S. citizen wife and four citizen children); *Texeira Baptista v. Mukasey*, No. 08-60142 (5th Cir. Aug. 5, 2008) (U.S. citizen mother, LPR father, three citizen siblings, one citizen daughter); *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004) (LPR wife, seven U.S. citizen children); *Ramirez-Solis v. Holder*, 130 S. Ct. 3463 (2010) (LPR wife, three minor U.S. citizen children).

[23] INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

[24] INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).

[25] INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii).

This statutory bar has resulted in numerous previous residents of the United States being removed to dangerous countries.[26] The dangerousness of the country of origin often effectively serves as a court-ordered family dismantling, because parents and/or spouses face too severe a threat of injury to follow the removed alien. The family destruction which ensues affects the well-being of both U.S. citizens and lawful permanent residents.[27]

Withholding of removal is a similar form of relief available to those noncitizens adjudged removable whose "life or freedom" would be threatened on account of the same factors listed above and for whom persecution is "more likely than not."[28] In contrast to asylum, withholding of removal is a temporary bar against government deportation, and may not be used as the basis for petitioning for lawful permanent residency or citizenship. Withholding of removal is primarily meant for removable individuals who face a greater than 50% likelihood of persecution, torture, or even death if returned to their home countries.

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[26] *See, e.g., Lemaine v. Holder*, 393 F. App'x 353 (5th Cir. 2010) (Haitian national deportable despite the prospect of indefinite imprisonment upon arrival, and the documented horrific prison conditions common to Haiti (guards beating inmates with fists, sticks, and belts; burning with cigarettes; choking; hooding; and torture by electric shock)); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006) (removal of an Eritrean national facing severe religious persecution upon return to country of origin); *In re Haili-Mariam*, 2007 WL 4182339, *2 (BIA Oct. 22, 2007).

[27] Michael Falcone, *supra* note 20.

[28] INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(1)(B)(iii).

Congruently with noncitizens seeking asylum, aliens convicted of an aggravated felony are often ineligible for withholding of removal. Those aggravated felony convictions resulting in a criminal sentence of more than five years are defined in the statute as particularly serious crimes warranting an automatic bar to withholding of removal.[29] Going beyond this clear statement of statutory ineligibility, the Attorney General has also held that aggravated felony convictions carrying little to no criminal sentence bar withholding of removal.[30] There is no guarantee that an alien convicted of an aggravated felony would be permitted to stay temporarily in the United States even if facing extreme forms of persecution, torture, or death upon returning to the country of origin.

Finally, the INA has established a temporary safe haven in the United States for nationals of a foreign state if the Attorney General, after consultation with appropriate government agencies, determines that one of the enumerated afflictions plagues the foreign state.[31] Qualifying circumstances include: (1) Ongoing armed conflict within the state poses a serious threat to the personal safety of the country's nationals if removed;[32] (2) earthquake, flood, drought, epidemic, or other environmental

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[29] INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

[30] *See Matter of Y-L-, Matter of A-G, & Matter of R-S-R-*, 23 I. & N. Dec. 270, 273 (BIA 2002) (drug trafficking crimes regardless of accompanying criminal sentence may be presumed to be per se "particularly serious crime" unless "extraordinary and compelling circumstances" are demonstrated); *see also* 8 C.F.R. § 208.16(d)(2).

[31] INA § 244, 8 U.S.C. § 1254a; 8 C.F.R. §§ 244, 1244; 56 FR 23491 (May 22, 1991).

[32] INA § 244(b)(1)(A), 8 U.S.C. § 1254a(b)(1)(A).

disaster has resulted in a substantial but temporary disruption of living conditions in the area affected; the foreign state is unable temporarily to handle the return of its nationals; and the foreign state has affirmatively requested designation;[33] or (3) extraordinary and temporary conditions in the foreign state prevent its nationals from returning safely, unless the Attorney General determines that it is contrary to national interests to allow these aliens to remain temporarily.[34] Upon being granted Temporary Protected Status ("TPS"), an alien may only retain that status for 6 to 18 months before reapplication.[35]

Despite these stringent qualification requirements, aliens convicted of aggravated felonies are barred from applying for TPS.[36] The result in the context presented to the Court would be sending tax-reporting offenders back to warring nations or ongoing natural disasters.

C. Mandatory Detention

Those individuals placed in removal proceedings due to an aggravated felony conviction face mandatory detention without the possibility of bond.[37] Unlike similar noncitizens facing removal, aliens convicted of an aggravated felony are not afforded the opportunity to prove that they are not a

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[33] INA § 244(b)(1)(B), 8 U.S.C. § 1254a(b)(1)(B).
[34] INA § 244(b)(1)(C), 8 U.S.C. § 1254a(b)(1)(C).
[35] INA § 244(a)(1)(A), 8 U.S.C. § 1254a(a)(1)(A).
[36] INA § 244(c)(2), 8 U.S.C. § 1254a(c)(2).
[37] INA § 236(c)(1), 8 U.S.C. § 1226(c)(1). Additionally, IIRIRA mandates detention at § 303(b)(3)(A)(i).

flight risk or a danger to the community. Instead, these individuals often sit in Immigration and Customs Enforcement ("ICE") custody for months, or even years, before the courts adjudicate their cases.[38] Such prolonged detention frequently results in hardship to families and enormous administrative costs.

D. Unlawfully Entering The United States

Noncitizens who entered the United States unlawfully, or re-enter after having been removed, face severe penalties for their violation of the immigration laws.[39] While all noncitizens are subject to fines and lengthy imprisonment,[40] the harshest penalties are reserved for those previously convicted of an aggravated felony. Aliens convicted of an aggravated felony face both a fine and up to twenty years in prison for a single reentry conviction, regardless of the severity of the predicate aggravated felony offense.[41] Moreover, those charged with assisting an alien convicted of an aggravated felony to enter the United States unlawfully face both a fine and up to ten years imprisonment.[42] This heavy

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[38] *See, e.g.*, *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (detaining an immigrant for over two years during removal proceedings initiated on account of an aggravated felony conviction); *Valansi v. Reno*, 278 F.3d 203 (3d Cir. 2002) (detaining an immigrant pursuant to section 1226(c) for nearly a year pending the completion of removal proceedings).

[39] INA § 276(a), 8 U.S.C. § 1326(a).

[40] INA § 276(a)(2), 8 U.S.C. § 1326(a)(2). The baseline sentence for this crime is a fine or imprisonment of up to two years, or both.

[41] INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).

[42] INA § 277, 8 U.S.C. § 1327.

punishment is imposed regardless of the relationship between the offender and the alien convicted of an aggravated felony, or the citizenship status of the aiding party. Sentencing is mandated based solely on the status of the alien convicted of an aggravated felony.

E. Naturalization

A prerequisite for naturalization in the United States is a demonstration of good moral character for five years prior to filing, extending all the way to the time of admission.[43] However, despite this required window, the INA states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was...one who at any time has been convicted of an aggravated felony."[44] Therefore, an alien convicted of an aggravated felony is permanently barred from seeking naturalization, regardless of the severity of the predicate offense, any demonstration of rehabilitation, or the passage of time since that conviction. This stringent bar to citizenship stands even if the aggravated felony was forgiven through a waiver many years ago, and even if the crime was committed prior to its categorization as an aggravated felony.[45] The only limit to the

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[43] INA § 316(a)(3), 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.2(a)(7).
[44] INA § 101(f)(8), 8 U.S.C. § 1101(f)(8).
[45] Letter, Miller, Acting Asst. Comm. Adjudications HQ 316-C (May 5, 1993), *reprinted in* 70 No. 22 *Interpreter Releases* 752, 769-70 (June 7, 1993); *Chan v. Gantner*, 464 F.3d 289, 292-94 (2d Cir. 2006) (applying INA §§101(a)(43)(N), (U) retroactively such that a conviction for conspiracy to commit alien smuggling

naturalization bar is that the alien's aggravated felony must have been sentenced after November 29, 1990.

F. Violence Against Women Act ("VAWA")

VAWA was enacted by Congress in part as a means for battered immigrant women and their children to escape violent and abusive marriages without facing the threat of deportation.[46] The Act serves as a legal basis for such abused women and their children to self-petition for lawful permanent residence and cancellation of removal.[47] This procedure allows the abused immigrants to pursue relief from their circumstances without requiring the cooperation of the abusing relative. It has been shown that such abusive spouses often use physical, mental, emotional, and economic violence against noncitizens as a result of their immigration status.[48]

However, VAWA requires that self-petitioners demonstrate the aforementioned good moral character prior to qualifying either themselves or

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barred citizenship for lack of good moral character despite affirmative grant of section 212(c) relief); *Socarras v. DHS*, 672 F. Supp. 2d 1320, 1324-25 (S.D. Fla. 2009) (aggravated felony bar to naturalization was not waived where petitioner had received a section 212(i) waiver when she became an LPR).

[46] Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941-42 (1994). Eligibility is defined at INA § 101(a)(51).

[47] INA §§ 204(a)(1)(A)(iii)-(vii), (B)(ii)-(ii), 8 U.S.C. §§ 1154(a)(1)(A)(iii)-(vii), (B)(ii)-(ii); 8 C.F.R. § 204.2(c), (e).

[48] Joanne Lin & Leslye Orloff, *VAWA 2005 Immigration Provisions*, Dec. 18, 2005, *reprinted in* AILA InfoNet Doc. No. 05122110, Dec. 21, 2005.

their children for relief.[49] The conviction for an aggravated felony bars any finding of good moral character, and eliminates the opportunity for battered women and their children to seek VAWA-based relief from their abusive relationships.

G. Cancellation Of Removal

Conviction of an aggravated felony categorically establishes a noncitizen's ineligibility for cancellation of removal.[50] Such cancellation proceedings allow lawful permanent residents of at least five years,[51] who have resided in the United States for at least seven years,[52] to request an immigration court to weigh the equities both for and against removal. This process allows the noncitizen to present evidence supporting his or her contention that removal is contrary to the interests of the United States,[53] with ultimate discretion regarding the granting of relief residing with the government. Positive factors in the cancellation analysis include: family ties within the United States, residency of long duration, evidence of hardship to the immigrant and family if removal were to occur, service in the

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[49] *Matter of* ___, A76-093-795, EAC 99-034-52692 (AAO Aug. 11, 1999), *reported in* 77 No. 5 *Interpreter Releases* 155, 168 (Feb. 1, 2000); 8 C.F.R. § 204.2(c)(2)(v).

[50] For permanent residents: INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). For non-permanent residents: INA § 240A(b), 8 U.S.C. § 1229b(b).

[51] INA § 240A(a)(1), 8 U.S.C. § 1229b(d).

[52] INA § 240A(a)(2), (d), 8 U.S.C. § 1229b(a)(2), (d).

[53] *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998).

Armed Forces,[54] history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and evidence attesting to an immigrant's good moral character.[55]

Conviction of an aggravated felony bars consideration of the aforementioned factors, and removal, barring extreme circumstances, is automatic. In fact, a noncitizen who satisfies all factors favoring cancellation of removal as listed above yet committed a minor aggravated felony decades ago receives the same categorical treatment as an alien convicted of multiple counts of first-degree homicide yesterday. Such inflexibility in the immigration laws prohibits the government from exercising sound discretion in individual immigrants' removal proceedings.

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[54] The United States has expressed a profound interest in protecting its veterans and service members. The linguistic and cultural diversity noncitizens bring to the armed forces is especially valuable in the context of national security. ANITA U. HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 1 (2005). In recognition of the benefits that noncitizens can offer the military, the government has been expanding its recruitment of noncitizens. Gerry J. Gilmore, *Military Recruits Non-citizen Health Care Workers, Linguists*, AMERICAN FORCES PRESS SERVICE, Dec. 5, 2008. There are approximately 29,000 non-citizens serving in the United States military, with another 8,000 enlisting each year. Moreover, thousands of immigrants have already served tours of duty in the United States military. More than 660,000 military veterans became citizens through naturalization between 1862 and 2000. HATTIANGADI ET AL., *supra* at 19.

[55] *C-V-T-*, 22 I. & N. Dec. 7; *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984); *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

H. Waivers Of Inadmissibility

Lawful permanent residents convicted of an aggravated felony are barred from seeking waivers of inadmissibility such as section 212(h) relief.[56] These waivers are designed to prevent deportation in circumstances where removal would result in extreme hardship to qualifying family members who are citizens or lawful permanent residents of the United States. These waivers are designed to protect the interests of the community.

I. Voluntary Departure

Grants of voluntary departure are not permitted for those aliens convicted of an aggravated felony.[57] Voluntary departure permits an alien to leave on his or her own accord within a stated period of time after tying up their affairs and paying their own way to depart. This provision provides an opportunity for removable aliens to ensure that lawful permanent resident and United States citizen relatives are taken care of after their removal and do not become public charges. Failing this, courts may

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[56] INA § 212(h), 8 U.S.C. § 1182(h); *Matter of Young*, 21 I. & N. Dec. 610 (BIA 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (1996). Aliens convicted of an aggravated felony are also barred from seeking relief from inadmissibility pursuant to INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A), or INA § 212(c), 8 U.S.C. § 1182(c).

[57] For pre-hearing voluntary departure: INA § 240B, 8 U.S.C. § 1229c(a)(1). For post-hearing voluntary departure: INA § 240B, 8 U.S.C. § 1229c(b)(1).

deport aliens convicted of an aggravated felony immediately, often requesting aliens to show up for proceedings with their bags packed. Valuable enforcement resources are preserved through voluntary departure, as the alien is charged with funding his or her own removal.

J. Expedited Removal, Administrative Removal, And Bar To Adjustment of Status

Most aliens convicted of an aggravated felony face expedited removal.[58] This process entails a conclusive presumption of deportability, and virtually no procedural protections ensuring a right to contest the charges.[59] Immigration officers are empowered by the INA to determine summarily the ineligibility of aliens convicted of aggravated felonies for continued admission, and immediately remove them from the United States without further hearing or review. Expedited removal requires the Attorney General to remove the alien within thirty day of conviction, or more commonly immediately following completion of the related prison sentence.

Additionally, under INA section 238(b), the Attorney General, through the administrative actions of ICE and other agencies, may determine the removability of aliens who are not lawful permanent residents or conditional permanent residents, and are finally convicted of a qualifying aggravated felony.[60] Those aliens entered into

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[58] INA § 238, 8 U.S.C. § 1228.
[59] INA § 238(c), 8 U.S.C. § 1228(c).
[60] INA § 238(b), 8 U.S.C. § 1228(b).

administrative removal proceedings are not afforded a hearing in front of an immigration judge to explain their circumstances. None of the protections that attend an immigration court hearing apply.[61]

Moreover, aliens convicted of an aggravated felony may be barred from adjustment of status for inadmissibility, or in the absence of such a designation, pursuant to the Attorney General's discretion.[62] For example, adjustment of status may be denied for people married to U.S. citizens, based on a single aggravated felony conviction.

K. Additional Disabilities

Further ineligibilities may be found in the Nicaraguan Adjustment and Central American Relief Act.[63] Similar penalty provisions are embedded in the Haitian Refugee Immigration Fairness Act.[64] Moreover, aliens convicted of aggravated felonies are prohibited from seeking a temporary suspension of deportation.[65] The suspension provisions were designed by Congress to exempt certain Salvadorans, Guatemalans, Haitians, Nicaraguans, and Eastern Europeans, among others, from the harsh consequences of retroactive application of the aggravated felony definition.

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[61] INA § 238(b)(4)(B), 8 U.S.C. § 1228(b)(4)(B).

[62] INA § 245, 8 U.S.C. § 1255.

[63] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997). *See, e.g.*, Section 202(a)(1)(B) (adjustment of status); Section 203 (special rule governing cancellation);

[64] Haitian Refugee Immigration Fairness Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (adjustment of status).

[65] INA § 243, 8 U.S.C. § 1254.

III. The Rule Of Lenity And The Rule Granting A Presumption To The Alien Of Narrow Statutory Construction Require Extending The Aggravated Felony Provisions Only To Those Predicate Crimes For Which Congress Has Clearly And Unambiguously Indicated Application.

The Rule of Lenity requires that deportation statutes be narrowly construed in favor of aliens. Judicial decisions have long applied this statutory interpretation canon to benefit noncitizens.[66] The rule is most frequently used in the context of immigration law in adjudicating discrepancies

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[66] *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1 (2004) (applying the rule of lenity as an alternative basis in interpreting why negligent acts would not constitute an aggravated felony under 18 U.S.C. §16); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (recognizing the rule of lenity and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948) (matter of doubt should be resolved in favor of the alien); *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) ("[T]he general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion...is particularly so in the immigration context where doubts are to be resolved in favor of the alien"); *INS v. Errico*, 385 U.S. 214, 225 (1966) (applying rule to provisions relating to relief); *Francis v. Reno*, 269 F.3d 162, 170-71 (3d Cir. 2001) (applying the rule of lenity to narrow interpretation of conviction as not being an aggravated felony); *Martin v. Gantner*, 443 F. Supp. 2d 367, 373 (E.D.N.Y. 2006) (in naturalization context, court held that conviction was not an aggravated felony because doubts are resolved in favor of the alien).

concerning whether a deportation provision should apply to a noncitizen. The central question in these cases is whether Congress unequivocally intended the exclusionary application. The Rule of Lenity also carries particular force where a statutory definition has both criminal and immigration consequences. The definition of ambiguous terms should be consistent in both the immigration and criminal contexts.[67]

In the instant case, there exists sufficient ambiguity in the statutory construction of the pertinent aggravated felony provision, 8 U.S.C. § 1101(a)(43)(M), and how it relates to the tax offense of which Petitioners were convicted to warrant application of the Rule of Lenity. The tremendously harsh consequences of a judicial expansion of the aggravated felony statute should serve as the impetus for interpretive constraint.

The Rule of Lenity has been applied with particular force in situations where a favorable interpretation of a statute serves that statute's "humanitarian purpose."[68] There is no doubt that the disabilities imposed on aliens convicted of an aggravated felony, as enumerated above, are in direct conflict with the humanitarian intent of Congress when it passes such statutory immigration relief. Asylum, withholding of removal, and temporary protected status were all designed to ensure that removable aliens were not sent home to face circumstances such as war, natural disaster, or

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[67] *Leocal v. Ashcroft*, 543 U.S. 1 (2004)

[68] *Errico*, 385 U.S. at 225 (applying rule of lenity to provisions relating to relief in order to serve their intended "humanitarian purpose").

extensive persecution. Cancellation of removal and waivers of inadmissibility were explicitly enacted both to protect the interests of United States citizens who would suffer extreme hardship due to an alien's removal, and to balance equities such as close family ties, long residence, community service, employment history, and rehabilitation against a single conviction. Finally, no congressional action can be said to serve a more humanitarian purpose than the Violence Against Women Act, enacted to provide women and their children a safe avenue for escaping abusive spouses.

Amici have witnessed firsthand how the separation of families living in the United States from their deported relatives can have disastrous emotional, physical, and financial consequences. This is particularly true in low-income families with limited resources, who often lack the economic means to visit a deported loved one. Removal, therefore, often serves as the complete and permanent destruction of a mixed status family, deporting the alien convicted of an aggravated felony and also ruining the lives of U.S. citizen and other relatives.

In applying the principles employed by this Court in congruent circumstances, the aggravated felony statute should be construed as narrowly as possible. In keeping with the Rule of Lenity, the Court should remain wary of interpretive expansion, and leave to Congress the application of all the devastating penalties described above to new, less severe crimes.

CONCLUSION

The disabilities and consequences which result for those aliens convicted of an aggravated felony inflict profound harm to both the noncitizens in question and, in many cases, to the families, communities, and country they leave behind. *Amici* respectfully urge this Court to reject expansive interpretations of the aggravated felony statute as inconsistent with congressional intent and core principles of statutory interpretation. The Court should therefore reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

IRA J. KURZBAN
Counsel of Record

KURZBAN, KURZBAN, WEINGER, TETZELI & PRATT, P.A.
2650 S.W. 27th Avenue
Miami, Florida 33133
(305) 444-0060
Attorneys for Amici Curiae

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AMICUS CURIAE BRIEF

No. 10-577

IN THE

Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,

Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF NATIONAL IMMIGRATION AND CRIMINAL DEFENSE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SRI SRINIVASAN
(Counsel of Record)
ssrinivasan@omm.com
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of national immigration and criminal defense organizations as *amici curiae* in support of petitioners in *Kawashima v. Holder*, No. 10-577.[1] Collectively, these organizations provide legal services, educational resources, and support to immigrants, criminal defendants, and attorneys. In serving those communities, *amici* organizations have a special interest and expertise concerning the intersection of immigration law and criminal justice, and have an acute awareness of the need for clear and fair application of the law to immigrants accused or convicted of criminal offenses and subject to immigration consequences as a result.

The **American Immigration Lawyers Association** ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

The **National Association of Criminal Defense Lawyers** ("NACDL") is a non-profit corporation with more than 12,500 members nationwide, joined by 35,000 members of 90 affiliate organizations in all 50 states. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL's members include criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The **Immigrant Defense Project** ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes, and therefore has a keen interest in ensuring that immigration laws relating to criminal case dispositions are correctly interpreted. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and re-

lied on *amicus curiae* briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60); *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (No. 05-547); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583); *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

Heartland Alliance's **National Immigrant Justice Center** ("NIJC") is a Chicago-based organization working to ensure laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 8,000 non-citizens per year, and represents hundreds of non-citizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences. For nearly ten years, NIJC has offered no-cost trainings and consultation to criminal defense attorneys representing non-citizens, advising them

on likely immigration consequences resulting for their clients from various potential dispositions in the criminal case; NIJC also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings. Because of the severity of the immigration consequences for non-citizens, NIJC has a strong interest in ensuring criminal convictions have consequences that are reasonable, predictable, and publicly known.

The National Immigration Project ("NIP") of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP provides legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of IMMIGRATION LAW AND CRIMES and three other treatises published by Thomson-West. NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court.

The National Legal Aid & Defender Association ("NLADA"), founded in 1911, is this country's oldest and largest non-profit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training, and the development of nationally applicable standards. NLADA promotes the fair, transparent, efficient, and uniform admini-

stration of criminal justice, and serves as the collective voice for both civil legal services and public defense services throughout the nation.

SUMMARY OF ARGUMENT

Petitioners are permanent resident aliens who have resided in the United States since leaving Japan in 1984. In 1997, petitioners each pleaded guilty to one count of making a false statement on a tax return, in violation of 26 U.S.C. § 7206. The former Immigration and Naturalization Service ordered them removed to Japan on the ground that their convictions constituted an "aggravated felony" as that term is used in the Immigration and Nationality Act ("INA"). The Ninth Circuit affirmed the removal orders, holding that petitioners' offenses qualify as aggravated felonies.

The Ninth Circuit's decision was incorrect and must be reversed. The INA's definition of aggravated felony does not include tax code offenses other than tax evasion. The INA provides that aggravated felonies include offenses "involv[ing] fraud and deceit in which the loss to the victim or victims exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(i)), but goes on *in that same sentence* to single out, for treatment as an aggravated felony, the offense "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(ii)). Even if (M)(i) were assumed in the abstract to be broad enough to encompass tax code offenses involving revenue loss to the government, it cannot be read in isolation. And the specific treatment of tax evasion—the most serious of the revenue offenses—in

(M)(ii) gives it obvious relevance to the interpretive question raised by this case.

To determine the meaning of (M)(i), courts must therefore consider the impact of (M)(ii), which can be evaluated by use of established canons of statutory interpretation. And all such applicable canons point to the same conclusion: that Congress did not intend tax code offenses other than tax evasion to be treated as aggravated felonies. *First*, the rule against superfluities requires that effect be given to each clause of a statute so that none is rendered mere surplusage. (M)(ii) would be entirely superfluous if "offenses involv[ing] fraud and deceit" applied to tax code offenses, because every conviction for tax evasion requires fraudulent or deceitful conduct. *Second*, a more specific provision takes precedence over a general provision, and Congress is presumed to have acted intentionally when including particular language in one provision and excluding it elsewhere. (M)(ii) singles out a specific tax code offense for treatment as an aggravated felony, signaling that it—and not the more general fraud and deceit offenses provision—controls which tax code offenses qualify as aggravated felonies. That conclusion is confirmed by the fact that (M)(ii) applies specifically to "*revenue* losses," while (M)(i) applies more generally to "losses".

Finally, to the extent that any ambiguity remains, the rule of lenity would require that the ambiguity be resolved in favor of the alien and/or criminal defendant. Because designating a crime an aggravated felony carries extremely serious immigration consequences, the immigration rule of lenity ap-

plies. Moreover, because the definition of aggravated felony has both civil and criminal consequences, the criminal rule of lenity also applies.

ARGUMENT

The Government has taken the position that fraud or deceit is a necessary element of petitioner's convictions under 26 U.S.C. § 7206 for wilfully making (or aiding in the making of) a return or statement under penalty of perjury that the individual does not believe to be true as to every material matter. It is far from clear that is the case: § 7206, unlike the § 7201 crime of tax evasion, contains no requirement that the individual intended anyone believe the false statement or that the false statement be an attempt to avoid taxes. This Court, in any event, need not decide whether fraud or deceit is a necessary element of a § 7206 conviction.

The Court instead can resolve this case based on the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). That principle compels the conclusion that Section 1101(a)(43)(M)(i) of Title 8, which treats as an "aggravated felony" an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," excludes tax code offenses resulting in revenue losses to the government. Such crimes instead are addressed by the immediately ensuing provision, Section 1101(a)(43)(M)(ii), which alternatively treats as an "aggravated felony" an offense that is "described in section 7201 of Title 26 (relating to tax evasion) in

which the loss to the Government exceeds $10,000." The latter provision defines the universe of tax code offenses against the federal government that qualify as aggravated felonies, and it would have little—if any—purpose if it did not perform that function. At the very least, the question whether (M)(i) encompasses tax code offenses, notwithstanding (M)(ii), has no clear answer, in which case long-settled principles of lenity dictate reading (M)(i) to exclude tax crimes like the ones at issue here.

I. THE PLAIN MEANING OF THE STATUTE CANNOT BE DISCERNED BY LOOKING TO A SINGLE PROVISION IN ISOLATION

Section 1101(a)(43)(M)(i) cannot be viewed in isolation. It must instead be interpreted in light of the context in which it is found and the text that surrounds it. (M)(ii), which immediately follows (M)(i), identifies a single tax code offense for treatment as an aggravated felony. That provision has obvious relevance to the question whether (M)(i) encompasses lesser tax code offenses. The Ninth Circuit thus erred by refusing to consider (M)(ii) before reaching its erroneous conclusion as to the meaning of (M)(i).

A. (M)(ii) Is Plainly Relevant To The Question Whether (M)(i) Applies To Revenue Offenses

8 U.S.C. § 1101(a)(43) classifies a number of offenses as aggravated felonies. This list includes, in Subparagraph (M):

> an offense that—
>
> (i) involves fraud or deceit in which the

> loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The "loss to the victim or victims" to which (M)(i) refers, if read in strict isolation, might arguably be broad enough to encompass tax code offenses involving fraud or deceit that result in revenue loss to the government. But in (M)(ii)—which was enacted at the same time—Congress went on to single out a particular fraud crime, involving revenue losses to the government, for special treatment.

Because tax evasion necessarily involves fraud and deceit (a point discussed in greater detail *infra*), there would have been no need to specify that tax evasion was an aggravated felony if (M)(i) captured tax code offenses. And it is exceedingly unlikely that Congress would have intended to "leave subparagraph [(M)(ii)] with little, if any, meaningful application." *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009) (rejecting an interpretation of (M)(i) that would have had a similarly extreme limiting effect). Plainly, then, it would be inappropriate to assess whether (M)(i) applies to tax code offenses without considering the interrelationship between (M)(i) and (M)(ii). *See Davis*, 489 U.S. at 809 ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum.").

There is ample reason that Congress might have

wanted, in (M)(ii), to single out tax evasion as the sole tax code offense to be accorded treatment as an aggravated felony. In light of the extremely serious immigration consequences attached to aggravated felonies, discussed *infra*, Congress may well have intended to distinguish tax evasion—"the gravest of offenses against the revenues"—as the only tax code offense deserving of that treatment. *See Spies v. United States*, 317 U.S. 492, 499 (1943). As the "capstone of [the] system of sanctions . . . calculated to induce . . . fulfillment of every duty under the income tax law," *Boulware v. United States*, 552 U.S. 421, 424 (2008) (quoting *Spies*, 317 U.S. at 497) (alterations in original), Congress has already allocated more serious criminal consequences to tax evasion than to any other tax code offense.[2] Similar treatment in the immigration context would be expected.

This Court has previously confronted an analogous question of interpretation of a definitional provision in the INA. 8 U.S.C. § 1101(h) defines "serious criminal offense" as:

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohib-

---

[2] *Compare* § 7201 (maximum 5 years of imprisonment for tax evasion) *with* § 7206 (maximum 3 years of imprisonment for filing or assisting the filing of a false statement under penalty of perjury) and § 7207 (maximum 1 year of imprisonment for filing a false statement).

> ited substances if such crime involves personal injury to another.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Government argued that a DUI causing bodily injury was a "crime of violence" under the broad language of 18 U.S.C. § 16 ("an offense that has as an element the use . . . of force" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). This Court, however, unanimously held that Congress had not intended DUI offenses to be crimes of violence, in part because of the structure of §1101(h):

> Congress' separate listing of the DUI-causing-injury offense from the definition of "crime of violence" in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave [§ 1101(h)(3)] practically devoid of significance. As we must give effect to every word of a statute wherever possible, the distinct provision for these offenses under [§ 1101(h)] bolsters our conclusion that § 16 does not itself encompass DUI offenses.

Leocal, 543 U.S. at 12.

That interpretation meant that some offenses to which (h)(3) did not directly apply (for example, DUI offenses that did not result in personal injury) would be excluded from a general provision that on its face might have applied to them. But this Court nonetheless determined that Congress' specific inclusion

of *some* DUI offenses evinced an intent to exclude *all other* DUI offenses. So too here: the specific inclusion of one tax code offense in (M)(ii)—*i.e.*, the "capstone" offense of tax evasion—evinces an intent to exclude all other (and lesser) tax code offenses. *See Nijhawan*, 129 S. Ct. at 2301 (describing (M)(ii) as "the internal revenue provision"). At the very least, any assessment of the meaning of (M)(i) must take into account the interrelationship between (M)(i) and (M)(ii), and must recognize that the latter provision bears materially on the scope of the former.

B. The Meaning Of (M)(i) Cannot Be Discerned By Looking To That Provision In Isolation

The Government, like the Ninth Circuit majority below, contends that "'the clear language' of Subparagraph (M)(i) . . . includes petitioners' convictions to the extent that their offenses 'involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000.'" Br. in Opp. 13 (internal citations omitted; alterations in original). *See also* Pet. App. 19a. In essence, the Government argues that the revenue loss provision (M(ii)) casts no doubt on the meaning of the general loss provision (M(i)) because "loss" is clear if one simply ignores the reference to "revenue loss" in the second half of the sentence. This reasoning disregards basic principles of statutory interpretation.

To reach the conclusion that subsection (M)(i)'s meaning is plain from a literal reading of the text, both the Government and the Ninth Circuit examined the provision without regard to the very next clause, (M)(ii), which singles out a specific tax code

offense for treatment as an aggravated felony. To be sure, if (M)(i) were considered in isolation, "loss" might arguably include revenue loss and "victim" might arguably include the United States Government. But this Court has repeatedly held that the plain meaning of a statutory clause cannot be discerned without considering the language that surrounds it: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

The surrounding text is particularly important where, as here, the interpretive dispute centers on the breadth of a particular word or phrase. As this Court recently reaffirmed, "construing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities.'" *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1179 (2011). Rather, a "word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

The Ninth Circuit below ignored this Court's clear and consistent direction to consider the surrounding text. Instead, it held that (M)(i)'s meaning

was plain *before considering the impact of (M)(ii)*. In the court's view, "the text of subsection (M)(i) [ ] categorizes an offense as an aggravated felony as long as it includes two elements, 'fraud and deceit' and loss to the victim in excess of $10,000. No further limitations are imposed." Pet. App. 19a. And although the court went on to acknowledge that "*there are many reasons why Congress might have included subsection (M)(ii)* even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i)," *id.* (emphasis added), it nonetheless applied none of the traditional interpretive canons—such as the canon against superfluity—to determine Congress' intent in enacting (M)(ii).

This Court recently considered and rejected just such an approach:

> The dissent says that the antisuperfluousness canon has no place here because "there is nothing ambiguous about the language of § 3501(a)." But this response violates "the cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) . . . [T]he dissent's point that subsection (a) seems clear when read in isolation proves nothing for the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. When subsection (a) is read in context, there is no avoiding the question, "What could Congress

> have been getting at with both (a) and (c)?"

Corley v. United States, 129 S. Ct. 1558, 1566 n.5 (2009). A provision's meaning may appear clear when read in isolation from a closely related provision. But Congress' intent can be fairly discerned only by examining all of the language it used.

II. ESTABLISHED CANONS OF STATUTORY INTERPRETATION COMPEL THE CONCLUSION THAT "AGGRAVATED FELONY" DOES NOT INCLUDE FILING A FALSE TAX RETURN

Because statutory provisions must be read in context, the Ninth Circuit should have looked to traditional canons of statutory interpretation to determine (M)(ii)'s effect on (M)(i). All applicable interpretive canons compel a finding that petitioners' convictions do not qualify as aggravated felonies.

A. The Rule Against Superfluities Compels The Narrower Interpretation of (M)(i)

1. The interpretation of (M)(i) adopted by the Ninth Circuit violates the rule against superfluities: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp 181-186 (rev. 6th ed. 2000)). *See also Corley*, 129 S. Ct. at 1566 (describing the rule against superfluities as "one of the most basic interpretive canons"); *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (describing it as a "cardinal rule"). A conviction for tax evasion

necessarily requires a showing of fraud or deceit. Congress would have understood—and assumed—as much when it enacted (M)(i) and (M)(ii). Indeed, the primary definition of "tax fraud" when Congress enacted Subsection (M) was the "[f]ederal offense of willfully attempting to evade or defeat the payment of taxes due and owing. [Internal Revenue Code] 7201." BLACK'S LAW DICTIONARY 661 (6th ed. 1990).

Because tax evasion necessarily involves fraud or deceit, (M)(ii) would be wholly redundant if (M)(i) applied to tax code offenses. The rule against superfluities thus compels adopting an interpretation of (M)(i) that avoids that result—*viz.*, an interpretation under which (M)(i) excludes tax code offenses against the federal government, and leaves to (M)(ii) the task of defining the universe of tax code crimes qualifying as aggravated felonies. *Cf. Nijhawan*, 129 S. Ct. at 2302 (rejecting an interpretation of (M)(i) that would leave that provision with "little, if any, meaningful application").

2. The Government seeks to avoid application of the rule against superfluities by suggesting that "tax evasion can entail, but does not necessarily require, proof of fraud or deceit." Br. in Opp. 10. That is incorrect. Section 7201 defines tax evasion as "willfully attempt[ing] in any manner to evade or defeat any tax imposed by this title or the payment thereof." 26 U.S.C. § 7201. With respect to tax evasion, willfulness is the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991) (internal quotation marks omitted). And this Court has held that attempting to evade or defeat taxation requires a willful *com-*

mission, not simply an omission. *Sansone v. United States*, 380 U.S. 343, 351-52 (1965).

Because tax evasion requires more than simply refusing to file a return or to pay taxes, *id.*, there is no "honest" tax evasion in which an individual truthfully or mistakenly reports (or remains silent regarding) their tax liability and/or ability to pay taxes due. Some attempt to mislead, misrepresent, conceal, or give a false impression, with the intent of depriving the government of revenue to which it is entitled, is a prerequisite for every tax evasion conviction.[3] For that reason, an individual convicted of criminal tax evasion is estopped from denying civil tax fraud under 26 U.S.C. § 6653: "Because the attempt to evade tax is the gravamen of fraud . . . [s]uch identity of criminal tax evasion and civil tax fraud for purposes of collateral estoppel has been repeatedly sustained by the courts." *Wright v. Comm'r*, 84 T.C. 636, 642 (1985); *see also Anderson v. Comm'r*, 2009 Tax Ct. Memo LEXIS 45, 60-61 ("convictions for filing a false return under section 7206(1) . . . do[] not prove civil tax fraud," while the attempt "'to evade or defeat any tax' under section 7201 [is] a conviction that does prove fraud").

The Government cannot have it both ways. It cannot say that a crime of tax evasion under § 7201 does not necessarily involve fraud or deceit at the

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[3] Deceit is defined as "[t]he act of intentionally giving a false impression" or "[a] false statement of fact made . . . with the intent someone else will act upon it," while fraud is "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." BLACK'S LAW DICTIONARY 465, 731 (9th ed. 2009).

same time that it argues that a lesser crime of making a false statement does necessarily involve fraud or deceit. This Court has held that "the elements involved in 26 U. S. C. § 7207 [willful filing of a document known to be false or fraudulent] . . . are *a subset of the elements in 26 U.S.C. § 7201* [tax evasion]," *Schmuck v. United States*, 489 U.S. 705, 720 n.11 (1989) (emphasis added) (citing *Sansone v. United States*, 380 U.S. 343, 352 (1965)), and thus that false or fraudulent filing is a lesser-included offense of tax evasion. *See Sansone*, 380 U.S. at 352-53.[4] Lesser-included offenses by definition cannot require proof of any element not also an element of the greater crime. Thus, if the Government were correct in its argument that fraud or deceit is a necessary element of the crime of making a false statement, then it cannot avoid the conclusion that fraud or deceit is likewise a necessary element of tax evasion.

That conclusion is consistent with this Court's articulation of the sorts of conduct that would support an inference of tax evasion: "keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and *any conduct, the likely effect of which would be to mislead or to conceal*." *Spies*, 317 U.S. at 499 (emphasis added). The Court thus assumed that tax

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[4] Section 7207, like § 7206, criminalizes the willful making of a false statement, but § 7207 imposes lesser penalties because it does not require that the false statement be made under penalty of perjury.

evasion encompassed only conduct that would "mislead or conceal." *Id.*; *see also United States v. Johnson*, 319 U.S. 503, 511-12 (1943) (describing systemic tax evasion as a "continuous course of fraudulent conduct").

The Government has yet to identify a single situation in which tax evasion would involve neither fraud nor deceit. Indeed, the Government makes no contention that the authorities it cites (Br. in Opp. 11) did not involve fraud or deceit. *See Johnson*, 319 U.S. at 517-18 (widespread conspiracy to conceal profits of illegal gambling business); *United States v. Mal*, 942 F.2d 682, 685 n.3 (9th Cir. 1991) (falsely claiming exemption from withholding in an attempt to avoid taxation); *United States v. Gordon*, 242 F.2d 122, 123-24 (3d Cir. 1957) (conspiring with an IRS agent who filed a false report about a taxpayer and then persuaded the taxpayer to pay purportedly outstanding taxes to the conspirators rather than the IRS).

Critically, moreover, even if the Government could identify some remote circumstances in which tax evasion would involve neither fraud nor deceit, the rule against superfluity would still apply. That rule forbids any interpretation of M(i) that would "render [M(ii)] *insignificant*," even "if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added). As this Court has explained, a statute should be construed in a manner "that no part will be inoperative or superfluous, void *or insignificant*." *Hibbs*, 542 U.S. at 101 (emphasis added); *see also Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988) (refusing to adopt

an interpretation that would render a statutory provision "substantially redundant"). The possibility that there exists some manufactured, hypothetical circumstance in which tax evasion would fail to involve fraud or deceit thus would afford no basis for disregarding the rule against superfluity.

3. The majority below recognized the superfluity engendered by its interpretation of (M)(i), but declined to apply the rule against superfluity because "there are many reasons why Congress might have included subsection (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i) . . . '[s]ubsection (M)(ii) may have been enacted simply to make certain—even at the risk of redundancy—that tax evasion qualifies as an aggravated felony.'" Pet. App. 19a-20a (quoting then-Judge Alito's dissenting opinion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004)). But had Congress simply wished to make certain that tax evasion was captured by the definition of aggravated felony, it could have easily included language to that effect.[5] And because this

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[5] The tax evasion statute, § 7201, itself illustrates Congress' ability to designate intentional redundancies. This Court has rejected the argument that a more general statute criminalizing false statements was intended to exclude such statements from the acts that constitute tax evasion, because, "[b]y providing that the sanctions [for tax evasion] should be 'in addition to other penalties provided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well." *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952) (internal citation omitted). By contrast, (M)(ii) includes no language indicating that it is intentionally superfluous, although there are a variety of ways in which Congress could have signaled that intent if it had wished to do so (*e.g.*

Court "presum[es] that Congress legislates with knowledge of our basic rules of statutory construction," *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), the Court should presume that Congress would have indicated any intention on its part to enact an entirely superfluous provision. Congress gave no such indication here.

More fundamentally, the entire purpose of applying settled canons of statutory interpretation is to establish ground rules for discerning congressional intent where the plain text alone fails to dictate an answer. Here, for instance, Congress *might* have intended to enact a redundant provision in case some as-yet unknown situation arose in which tax evasion would fall outside (M)(i). Conversely, Congress *might* have enacted (M)(ii) because it wanted to single out tax evasion as the sole revenue offense that qualifies as an aggravated felony. The rule against superfluities provides the courts with a means of choosing among these competing might-haves. Neither the Ninth Circuit nor the Government has provided a sound basis for abandoning that long-settled canon in favor of their preferred interpretation of Congress' intent.

B. The More Specific Language Of (M)(ii) Takes Precedence Over The General Language of (M)(i)

1. A second canon of interpretation reinforces the propriety of reading M(i) to exclude tax code offenses: "However inclusive may be the general lan-

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"notwithstanding (M)(i), tax evasion is an aggravated felony even if there is no proof of fraud or deceit").

guage of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (internal quotation omitted; alteration in original); *see also Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (internal quotation omitted; emphasis in original). This "basic principle of statutory construction" applies "particularly when the two [provisions] are interrelated and closely positioned." *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981).

A close cousin of the specific-governs-the-general rule is the presumption that, "[w]here Congress includes particular language in one section of a statute but omits it in another," Congress "acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23, (1983)). *See, e.g., id.* (that a statute refers to "jurisdiction" rather than "jurisdiction to render judgment" is significant where the latter was used in related statutes); *Bailey v. United States*, 516 U.S. 137, 146 (1995) (adopting a less expansive definition of "use" of a firearm because Congress had in other statutes included both "used" and "intended to be used").

Here, accordingly, Congress' specific reference to

"revenue losses" in (M)(ii)—immediately following its use of the more general term "losses" in (M)(i)—must be viewed as a deliberate choice. And the provision that is specific to "revenue losses" singles out tax evasion alone as an aggravated felony.

2. The Government concedes the applicability of the specific-governs-the-general canon. It contends, though, that "the specific reference to 'tax evasion' in Subparagraph (M)(ii) would govern more general references, but only with regard to the category of offenses to which it speaks (tax evasion)." Br. in Opp. 12. This Court, however, does not interpret specifically-worded statutory provisions in such a constrained manner.

In *Leocal*, for instance, the Court considered the interrelationship between a provision defining the term "serious criminal offense" to encompass "any crime of violence" and a provision defining the same term alternatively to encompass a particular subcategory of DUI offenses. 543 U.S. at 12 (construing 8 U.S.C. § 1101(h)(2)-(3)). The Court held that the latter, specific provision meant that the former provision fails to encompass DUI offenses at all, not merely the subcategory of DUI offenses covered by the specific provision. *Id.*

Here, correspondingly, M(ii)'s specific reference to the offense of tax evasion supports construing M(i) to exclude all tax code offenses, in deference to Congress' specification that a particular tax code offense—tax evasion—qualifies as an aggravated felony. *Accord HCSC-Laundry*, 450 U.S. at 4-5 (501(c)(3) tax exemption for charitable organizations does not apply to a non-profit hospital laundry ser-

vice even though that organization falls within the general 501(c)(3) definition, because 501(e) specifically lists exempt hospital service organizations and is silent as to hospital laundries); *Preiser v. Rodriguez*, 411 U.S. 475, 488-89 (1973) (habeas statute does not simply govern habeas claims, but also precludes § 1983 claims challenging criminal convictions and sentences).

The Government also notes (Br. in Opp. 12) that (M)(i) captures a number of fraud offenses involving "loss" to the government, such as "offenses involving conspiracy to defraud the United States, theft in federally funded programs, fraud in connection with a health-care-benefit program, and contract fraud against the United States." As a result, the Government asserts, M(i) "may indeed encompass offenses resulting in losses to the government." *Id.*

That rationale misperceives the basis for applying the specific-controls-the-general rule in this case. The material, specific reference in M(ii) is "*revenue* loss," not mere "loss" of any kind. And the import of M(ii)'s specific reference to "revenue loss" is that M(i) should be construed to exclude offenses involving "revenue loss" to the Government, not "loss" of any kind to the Government. Petitioners' argument therefore has no effect on whether M(i) encompasses offenses involving other types of "loss" to the Government, such as contract fraud, embezzlement, and theft from federally funded programs. The salient point instead is that M(i) fails to encompass offenses involving "*revenue* loss" to the Government—*viz.*, tax code offenses. Congress specified in M(ii) that only *one* offense causing "revenue" loss to the Govern-

ment qualifies as an aggravated felony: the "capstone" tax code offense of tax evasion. There is no cause for construing the more general provision—M(i)—in a manner undermining Congress' specification in M(ii).

III. PRINCIPLES OF LENITY REQUIRE RESOLVING ANY REMAINING AMBIGUITY IN PETITIONERS' FAVOR

The rule against superfluities and the canon that the specific controls the general fully suffice to resolve the proper understanding of M(i). But even assuming, *arguendo*, that any ambiguity remains, principles of lenity compel construing M(i) to exclude tax code offenses from its scope.

1. The rule of lenity requires that ambiguities in immigration statutes be resolved in favor of the alien:

> We resolve the doubts in favor of [the narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile . . . . since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). Basic principles of fairness and due process require that individuals face that "drastic measure" only if they were on clear notice that their crime could give rise to this severe punishment. Because

"[d]eportation is always a harsh measure"—and all the more so for individuals like the petitioners, who have lived in this country for more than 25 years—courts apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Errico*, 385 U.S. 214, 225 (1966).

The consequences that attend the designation of an offense as an aggravated felony are particularly serious. An alien convicted of an aggravated felony is, *inter alia*: subject to expedited removal (8 U.S.C. § 1228(a)); ineligible for the main discretionary waiver of removal (8 U.S.C. § 1229b); ineligible for asylum (8 U.S.C. §§ 1158(b)(2)(A)(ii) and (b)(2)(B)(i)); ineligible to gain readmission to the United States (8 U.S.C. § 1182(a)(9)(A)); and is generally unable to obtain judicial review of his or her removal order (8 U.S.C. § 1252(a)(2)(C)). Moreover, an alien arrested after an aggravated felony conviction is subject to mandatory detention during removal proceedings (8 U.S.C. § 1226(c)). In light of these significant consequences, lenity is particularly appropriate.

2. In addition to the rule of lenity that applies in the immigration context, the *criminal* rule of lenity fortifies the conclusion that petitioners' convictions fail to qualify as aggravated felonies. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself," and serves two important goals: "the tenderness of the law for the rights of individuals; and [ ] the plain principle that the power of punishment is vested in

the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also United States v. Hayes*, 129 S. Ct. 1079, 1093 (2009) (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority."); *Scheidler v. NOW, Inc.*, 537 U.S. 393, 409 (2003) ("[A] significant expansion of the law's coverage must come from Congress, and not from the courts."). These principles are safeguarded by a simple rule of construction: "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

The rule is fully applicable when the interpretive question arises in a civil suit, so long as the statute in question has criminal consequences in other circumstances: "The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the [statute] has criminal applications that carry no additional requirement of willfulness. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("It is not at all unusual to give a statute's ambigu-

ous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.")

That is the situation here. Under 8 U.S.C. § 1326(b)(1)-(2), the definition of aggravated felony in 8 U.S.C. 1101(a)(43) determines the maximum sentence for an alien who unlawfully re-enters the country after being removed: aliens removed pursuant to conviction of an aggravated felony are subject to imprisonment for twice the duration as those removed for non-aggravated felonies. Similarly, under the sentencing guidelines, the sentence for unlawfully entering or remaining in the United States increases by 8 levels for those convicted of an aggravated felony, as compared with 4 levels for those convicted of any other felony. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2010). The application notes that accompany that guideline specify that aggravated felony is to be defined as it is in 8 U.S.C. § 1101(a)(43). The question whether an offense qualifies as an aggravated felony under (M)(i) thus indisputably has criminal consequences. As this Court has explained, "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal*, 543 U.S. at 11-12 n.8. Any lingering ambiguity, in short, must be resolved in petitioners' favor.

3. The Government argues (Br. in Opp. 13-14) that the rule of lenity is inapplicable because it would usurp the BIA's authority to resolve statutory

ambiguities in the INA. But as this Court has explained: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The rule of lenity is one of the "traditional tools of statutory construction" routinely applied by courts, and this Court has specifically identified it as one of the rules of construction that renders a statute unambiguous and forecloses deference to any contrary interpretation by an agency. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85 (2005) (Court of Appeals erred in failing to give *Chevron* deference to agency interpretation because "the court invoked no other rule of construction (*such as the rule of lenity*) requiring it to conclude that the statute was unambiguous to reach its judgment") (emphasis added). In fact, this Court has found that the rule of lenity would require any ambiguity in a criminal statute to be construed in favor of an alien facing deportation for conviction of an aggravated felony even though the BIA had reached a contrary conclusion as to the statute's meaning. *See Leocal*, 543 U.S. at 3, 11 n.8; *see also Thompson/Center Arms*, 504 U.S. at 517-518 n.9 (applying the rule of lenity despite an agency's contrary interpretation of the challenged provision). Deference is particularly inappropriate where, as here, interpretation of the challenged provision turns in large part on substantive questions of tax law, an area outside of the BIA's expertise. *See Ki Se Lee*, 368 F.3d at 224-25 n.10. Consequently, no

deference would be owed the BIA's decision, and the rule of lenity requires that any lingering doubt be resolved in favor of petitioners.

CONCLUSION

For the foregoing reasons and those stated in petitioners' brief, this Court should reverse the judgment below.

Respectfully submitted,

SRI SRINIVASAN
(Counsel of Record)
ssrinivasan@omm.com
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

Attorneys for Amici Curiae

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IN THE

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AKIO AND FUSAKO KAWASHIMA,
Petitioners,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE JOHNNIE M. WALTERS IN SUPPORT OF PETITIONERS

ROBERT S. FINK
KOSTELANETZ & FINK, LLP
Seven World Trade Center
250 Greenwich Street
34th Floor
New York, NY 10007
(212) 808-8100

RICHARD W. O'NEILL
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
richard.o'neill@wilmerhale.com

HEATHER D. SCHAFROTH, PH.D.
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

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INTEREST OF AMICUS CURIAE

Amicus, Johnnie M. Walters, served as the Commissioner of Internal Revenue from 1969-1971, and as the Assistant Attorney General for the Tax Division of the U.S. Department of Justice from 1971-1973.[1] Mr. Walters also served for many years on the Commissioner's Advisory Board, the national committee that advises the Internal Revenue Service on tax policy and administration. During his sixty-year career, which began in the Office of the Chief Counsel of the Internal Revenue Service, Mr. Walters has advocated for increased IRS efficiency, tax system reforms, and vigorous prosecution of corporate tax fraud.

Based on his decades of service and experience, including at the highest levels of U.S. tax policy and enforcement, Mr. Walters believes that the outcome of this case will have a substantial effect on the reach of our nation's criminal tax laws and the ability of the Internal Revenue Service and the Tax Division to enforce those laws.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision that a violation of 26 U.S.C. § 7206(1) or (2) is an "aggravated felony" sufficient to trigger deportation under 8 U.S.C. § 1101(a)(43)(M) should be reversed.

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. In accordance with Rule 37.6, amicus states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than amicus or his counsel, has made a monetary contribution to the preparation or submission of this brief.

I. The Ninth Circuit's opinion rests on the incorrect premise that *all* "willful" tax violations involving "false" information—including those arising under Section 7206(1) or (2), and many other federal, state, and local tax codes—necessarily involve the type of "fraud or deceit" demanded by Section 1101(a)(43)(M)(i). The criminal tax laws do not treat crimes involving the "willful" provision of "false" information as interchangeable and synonymous with those involving "fraud or deceit" under the immigration laws.

The Ninth Circuit erred in concluding that Section 7206(1) and (2) require proof of fraud or deceit. Unlike a conviction of tax evasion under Section 7201—which proves criminal fraud and estops a taxpayer from denying civil fraud—convictions under Section 7206(1) or (2) do not necessarily require proof of either.

The Ninth Circuit's decision renders Section 1101(a)(43)(M)(ii) superfluous. The Ninth Circuit attempted to explain this result away by speculating that Congress may have added subparagraph (M)(ii) to make clear that Section 1101(a)(43)(M) covers every case of tax evasion—based on its understanding that the crime of tax evasion does not necessarily involve "fraud or deceit." But that misstates the law. Section 7201 is the only federal tax code provision that covers convictions for tax evasion, and *every* case of tax evasion under Section 7201 necessarily requires proof of fraud or deceit.

II. The Ninth Circuit's decision will lead to the deportation of legal permanent residents for almost *any* criminal tax offense, including numerous offenses arising under federal, state, and local tax laws, and even for misdemeanors. That result is contrary to Congress's stated purpose in enacting Section 1101(a)(43)(M),

which was to reserve the extreme sanction of deportation solely for the most severe type of tax crime—i.e., a conviction for tax evasion under Section 7201.

As a practical matter, the Ninth Circuit's decision will effectively preclude most plea deals for "willful" tax crimes involving "false" information alleged against legal permanent residents—who are far more likely to demand a trial, rather than admit guilt (even under a lesser offense) and face certain deportation. This drastic change will hamper the government's ability to enforce our tax laws effectively.

ARGUMENT

Under 8 U.S.C. § 1227(a)(2)(A)(iii), a legal permanent resident is deportable if convicted of an "aggravated felony"—which Congress expressly defined as, among other crimes:

> an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000[.]

8 U.S.C. § 1101(a)(43)(M). Examining the structure and settled interpretation of Title 26—commonly known as the Internal Revenue Code—clarifies why Congress structured Section 1101(a)(43)(M) to separate the crime "described in section 7201 of title 26 (relating to tax evasion)" in subparagraph (M)(ii) from other crimes of "fraud or deceit" in subparagraph (M)(i). Together these two provisions reserve the grave sanction of deportation for only those tax evasion crimes that fall within the scope of Section 7201, which itself imposes

the most severe penalties for any violation of the Internal Revenue Code.

The Ninth Circuit, however, held that any "willful" tax crime involving "false" information is an "aggravated felony" sufficient to trigger deportation under Section 1101(a)(43)(M)(i)—including violations of Section 7206(1) and (2) of the Internal Revenue Code, which require proof only that a person (1) "willfully" provided a document "made under the penalties of perjury" that he or she did "not believe to be true and correct as to every material matter," or (2) "willfully" helped prepare a document that is "fraudulent *or* is false as to any material matter." 26 U.S.C. § 7206(1)-(2) (emphasis added). The Ninth Circuit's interpretation is flawed as a matter of tax law, inconsistent with the expressed intent of Congress, and contrary to public policy.

I. The Ninth Circuit's Misreading Of Title 26 Is Significant And Expansive

The Ninth Circuit assumed that a violation of 26 U.S.C. § 7206(1) or (2) "necessarily" satisfies the "fraud or deceit" requirement of Section § 1101(a)(43)(M)(i) because such violations "require the government to prove either that the defendant 'willfully' subscribed to a statement in a tax return he did not believe to be true, or that the defendant 'willfully' aided and assisted in the making of a false or fraudulent return." *Kawashima* v. *Holder*, 615 F.3d 1043, 1052 (9th Cir. 2010). This attempt to equate the tax code's requirement of willfulness in providing false information with the immigration code's requirement of "fraud or deceit" fails. In fact, the Ninth Circuit's ruling to the contrary means that *all* of the numerous other "willful" federal, state, and local criminal tax violations requiring the provision

of "false" or "not ... true" information would also satisfy the "fraud or deceit" requirement of Section 1101(a)(43)(M)(i).[2]

A. Tax Crimes Requiring "Willfulness" Do Not "Necessarily" Satisfy The "Fraud Or Deceit" Requirement Of Section 1101(a)(43)(M)(i)

The statutory language at issue does not demonstrate any Congressional intent that proof of "willfulness" in committing a tax offense could serve as proof of "fraud or deceit" under the immigration laws. In the Internal Revenue Code, Congress distinguished criminal tax offenses "in ways that do not turn on the meaning of the word 'willfully,'" and instead "used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." *United States* v. *Bishop*, 412 U.S. 346, 358, 359-360 (1973). The tax code therefore reflects a choice by Congress to require proof of "willful" behavior for many tax crimes, only some of which also require proof of "false" behavior *or* fraud or deceit.[3] Indeed, this Court has defined the concept of

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[2] The Fifth Circuit similarly has held that "'[w]illfully' and knowingly signing and filing a false federal tax return unquestionably 'involves fraud or deceit'" under Section 1101(a)(43)(M)(i). *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 173 (5th Cir. 2008). In *Lee* v. *Ashcroft*, the Third Circuit held that a violation of Section 7206(1) is *not* an aggravated felony under Section 1101(a)(43)(M)(i), but the majority did not reach the issue of whether "willfully" providing "false" information under the tax laws establishes "fraud or deceit" under the immigration laws. 368 F.3d 218, 225 (3d Cir. 2004). *But see id.* at 226 (Alito, J., dissenting).

[3] *See, e.g.*, 26 U.S.C. § 7201 (concerning "[a]ny person who *willfully* attempts in any manner to *evade* or defeat any tax"); *id.* § 7202 (concerning "[a]ny person ... who *willfully* fails to collect or *truthfully* account for any pay over such tax"); *id.* § 7203 (concern-

"willfulness" in the criminal tax code without even discussing "fraud" or "deceit." *See Cheek* v. *United States*, 498 U.S. 192, 201 (1991) ("Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."). Thus, the "willfulness" requirement alone in a tax crime does not "necessarily" satisfy the "fraud or deceit" requirement of Section 1101(a)(43)(M)(i).

B. Tax Crimes Requiring "False" Information Do Not "Necessarily" Satisfy The "Fraud Or Deceit" Requirement Of Section 1101(a)(43)(M)(i)

The Ninth Circuit assumed that every conviction under Section 7206(1) or (2) "necessarily involve[s] 'fraud or deceit,'" because a conviction under those provisions requires proof of "willfulness" in combination with proof of providing "false" or "not ... true" informa-

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ing "[a]ny person ... who *willfully* fails to pay such estimated tax or tax"); *id.* § 7204 (concerning "any person ... who *willfully* furnishes a *false* or fraudulent statement or who willfully fails to furnish a statement"); *id.* § 7205(a) (concerning "[a]ny individual ... who *willfully* supplies *false* or fraudulent information, or who willfully fails to supply information"); *id.* § 7205(b) (concerning "any individual [who] *willfully* makes a *false* certification"); *id.* § 7206(1) (concerning "[a]ny person who ... *willfully* makes and subscribes any [document] ... made under the penalties of perjury, and which he does not believe is *true*"); *id.* § 7206(2) (concerning "[a]ny person who ... [*w*]*illfully* aids or assists in, or procures, counsels, or advises the preparation or presentation of [any document] ... which is fraudulent or is *false* as to any material matter"); *id.* § 7207 (concerning "[a]ny person who *willfully* delivers or discloses ... [documents] known by him to be fraudulent or *false*") (all emphases added).

tion. *Kawashima*, 615 F.3d at 1055. This assumption ignores the construction of "fraud," "deceit," and "falsity" in the prosecution of tax crimes under Title 26.

Courts have carefully distinguished the proof of fraud or deceit required for a tax evasion offense falling under Section 7201 from the proof required for "lesser" tax crimes, such as tax offenses under Section 7206(1) or (2). Crucially, a conviction for tax evasion under Section 7201 "conclusively establishes fraud in a subsequent civil tax fraud proceeding through application of the doctrine of collateral estoppel." *Gray* v. *Commissioner of Internal Revenue*, 708 F.2d 243, 246 (6th Cir. 1983); *see also United States* v. *Dale*, 991 F.2d 819, 858-859 (D.C. Cir. 1993) (per curiam) (referring to convictions under § 7206 as "lesser included offenses" when compared to "the 'capstone' section 7201 tax evasion convictions").

Indeed, the Ninth Circuit itself has made clear that convictions under Section 7206 do not require proof of a willful attempt to evade a tax or other fraudulent intent, unlike Section 7201: "Because section 7206(1) does not require a willful attempt to evade tax, *a conviction under section 7206(1), without more, does not establish fraudulent intent.*" *Considine* v. *United States*, 683 F.2d 1285, 1287 (9th Cir. 1982) (emphasis added). For that reason, taxpayers convicted of a crime under Section 7206(1) or (2), such as the Petitioners, are free to argue in a later civil proceeding that their tax crime did not involve fraud. *Id.*; *Wagner* v. *Commissioner*, No. 7602-88, 1996 WL 436201, at *5-6 (T.C. Aug. 6, 1996).

Nor do convictions under Section 7206(1) or (2) "necessarily" require proof of intent to deceive. Like convictions under 18 U.S.C. § 1001 (for making a false

statement to a federal official),[4] a conviction under Section 7206(1) or (2) requires proof of falsity, materiality, and willfulness—but does not require intent to deceive as an element of the crime. *United States* v. *Yermian*, 468 U.S. 63, 69 (1984) (Section 1001 "contains no language suggesting any additional element of intent, such as ... with the intent to deceive the federal government."); *United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) (interpreting § 1001 by relying on *Yermian* and stating that "the Supreme Court has itself rejected the claim that an 'intent to deceive' is required"); *United States* v. *Hills*, 618 F.3d 619, 638 (7th Cir. 2010) (holding that to convict under § 7206(1), "the government must demonstrate the existence of four elements beyond a reasonable doubt: (1) the defendant made or caused to be made a federal income tax return that she verified was true; (2) the return was false as to a material matter; (3) the defendant signed the return willfully[,] ... knowing it was false; and (4) the return contained a written declaration that it was made under penalty of perjury"); *United States* v. *Ali*, 616 F.3d 745, 755 (8th Cir. 2010) (holding that to convict under § 7206(2), the government must show "(1) the defendant aided, assisted, procured, counseled, advised or

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[4] Section 1001(a)(2) of Title 18 provides: "[w]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully ... makes any materially false, fictitious, or fraudulent statement or representation ... shall be fined." A conviction under Section 1001(a)(2) requires proof that "(1) the defendant made a statement; (2) the statement was false; (3) the defendant knew the statement was false; (4) such statement was relevant to the function of a federal department or agency; and (5) the false statement was material." *United States* v. *Algee*, 599 F.3d 506, 512 (6th Cir. 2010).

caused the preparation and presentation of a return; (2) the return was fraudulent *or* false as to a material matter; and (3) the act of the defendant was willful." (emphasis added)).[5]

In other words, convictions under Section 7206(1) or (2) do not *necessarily* "involve[] fraud or deceit" under Section 1101(a)(43)(M)(i), because neither "fraud" nor "deceit" is an element of proof required for those convictions. *See Conteh* v. *Gonzales*, 461 F.3d 45, 59 (1st Cir. 2006) ("An offense with a scienter element of either intent to defraud or intent to deceive categorically qualifies as an offense involving fraud or deceit" under § 1101(a)(43)(M)(i).). A conviction under Section 7206(1) requires proof that a document was false, not that it was fraudulent; conviction under Section 7206(2) requires proof that a document was false *or* fraudulent, rather than requiring proof of fraud. Unlike convictions under Section 7201—which *necessarily* involve proof of criminal, and thus civil, fraud—a conviction under Section 7206(1) or (2) is not even proof of civil fraud, let alone criminal fraud. The Ninth Circuit erred by ruling to the contrary.

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[5] In *Arguelles-Olivares*, the Fifth Circuit similarly reasoned that Section 1101(a)(43)(M)(i) includes tax crimes beyond those set forth in Section 7201 because such "tax felonies involv[e] fraud and deceit and the same amount of loss to the Government." 526 F.3d at 174. That argument fails for the same reasons set forth above—i.e., although a conviction for tax evasion under Section 7201 requires proof of an intent to defraud or deceive, convictions under Section 7206(1) or (2), and many other "willful" tax laws, do not.

C. The Ninth Circuit's Ruling Renders Section 1101(a)(43)(M)(ii) Superfluous Because The Crime Of Tax Evasion Necessarily Satisfies The "Fraud Or Deceit" Requirement Of Section 1101(a)(43)(M)(i)

Responding to a claim by the dissent that its decision would render Section 1101(a)(43)(M)(ii) superfluous, the Ninth Circuit speculated that Congress might have included that provision "just to ensure that no tax evasion case fell outside subsection (M)'s definition of an aggravated felony" or because "Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated felony simply because 'fraud' and 'deceit' are not specific elements of that offense." *Kawashima*, 615 F.3d at 1054. However, neither hypothesized reason finds support in the tax code.

To the contrary, it has long been settled that every tax evasion case must be prosecuted under Section 7201, and that every tax evasion conviction under Section 7201—known as the "tax fraud statute"—must have proof of "fraud or deceit." *Klein* v. *Commissioner*, 880 F.2d 260, 262 (10th Cir. 1989) (explaining conviction for tax evasion under Section 7201 "collaterally estops a taxpayer from denying fraud for purposes of a § 6653(b) civil tax case involving the same years"); *Gray*, 708 F.2d at 246 (holding that a conviction for tax evasion under Section 7201 "conclusively establishes fraud" and collecting cases); *see* Internal Revenue Manual 9.1.3.3.2.1 (explaining that tax evasion involves "deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events or to make things seem other than they are"), *available at* http://

www.irs.gov/irm/part9/irm_09-001-003.html (last visited Aug. 12, 2011).[6] Therefore, *every* conviction for tax evasion under Section 7201 *necessarily* involves proof of fraud or deceit, and a government "victim"[7]—i.e., each of the (non-monetary) elements set forth in Section 1101(a)(43)(M)(i).

Accordingly, contrary to the Ninth Circuit's suggestion, the only reason for Congress to list tax evasion as a separate deportable offense in Section 1101(a)(43)(M)(ii) was to single out tax evasion as the only tax crime severe enough to warrant the extreme punishment of deportation. *See Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481 (2010) (characterizing deportation as a "particularly severe 'penalty'" (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 740 (1893)); *Spies* v. *United States*, 317 U.S. 492, 497 (1943) (identifying tax evasion as "[t]he capstone of [the] system of sanctions ... calculated to induce ... fulfillment of every duty under the income tax law" and "the serious and inclusive [criminal tax] felony"); *see also Boulware* v. *United States*, 552 U.S. 421, 424 (2008) (repeating that tax evasion is the "capstone" tax crime, even after the enactment of the current version of § 7206); *Dale*, 991 F.2d at

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[6] The elements required for conviction of tax evasion under Section 7201 are proof of "willfulness; the existence of a tax deficiency; ... and an affirmative act constituting an evasion or attempted evasion of the tax." *Sansone* v. *United States*, 380 U.S. 343, 351 (1965) (internal citations omitted).

[7] *See Balogun* v. *U.S. Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005) ("[O]nly the government can be victimized by tax evasion."); *United States* v. *Presbitero*, 569 F.3d 691, 707 (7th Cir. 2009) ("The government is a victim in all tax fraud cases[.]"); *United States* v. *Fleming*, 128 F.3d 285, 288 (6th Cir. 1997) ("In tax fraud cases, we consider the United States Treasury the victim.").

858-859 (discussing "the 'capstone' section 7201 tax evasion convictions").

The Ninth Circuit's decision to the contrary improperly renders Section 1101(a)(43)(M)(ii) superfluous. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (quotation marks omitted)).

II. The Ninth Circuit's Enlargement Of Section 1101(a)(43)(M)(i) Is Massive And Disruptive

As a practical matter, by sweeping *all* "willful" and "false" tax crimes into Section 1101(a)(43)(M)(i), the Ninth Circuit's decision will lead to the deportation of legal permanent residents convicted of almost any criminal tax offense with a loss of over $10,000 under federal, state, and local laws—including misdemeanors.

A. Expanding Section 1101(a)(43)(M)(i) To Include All "Willful" And "False" Tax Violations Will Lead To Deportation For Violators Of Most Federal, State, And Local Tax Crimes

The U.S. tax code imposes willfulness and falsity requirements for a variety of tax offenses beyond Section 7206(1) and (2)—including for failure to truthfully account for and pay over collected taxes under Section 7202, furnishing a false W-2 statement to an employee under Section 7204, providing false withholding information to an employer under Section 7205, and filing

false documents under Section 7207.[8] The required willfulness and falsity is the same for these statutory provisions as for Sections 7206(1) and (2). *See Bishop*, 412 U.S. at 359-360 ("Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula."); *see, e.g., United States* v. *Holecek*, 739 F.2d 331, 335 (8th Cir. 1984) (equating falsity under Sections 7205 and 7206). Even Section 7203, which provides for a misdemeanor conviction for willful failure to file a return or other violations, may therefore "involve fraud or deceit" under the Ninth Circuit's interpretation. Violations of Sections 7203 and 7207, despite being misdemeanors, can be considered "aggravated felonies" under the immigration laws.[9]

The same result applies to state and local tax codes, because Congress did not limit the scope of deportable "offenses" under Section 1101(a)(43)(M)(i) to *federal* crimes. *See Ferreira* v. *Ashcroft*, 390 F.3d 1091, 1096-1097 (9th Cir. 2004) (holding that a state-law offense

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[8] *See, e.g.*, 26 U.S.C. § 7202 ("willfully fails to collect or truthfully account for and pay over such tax"); *id.* § 7204 ("willfully furnishes a false or fraudulent statement"); *id.* § 7205(a) ("willfully supplies false or fraudulent information"); *id.* § 7207 ("willfully delivers or discloses to the Secretary any ... document, known by him to be fraudulent or to be false as to any material matter").

[9] Offenses qualifying as "aggravated felonies" under 8 U.S.C. § 1101(a)(43) include *misdemeanors* as well as felonies. *See Biskupski* v. *Attorney Gen.*, 503 F.3d 274, 279-281 (3d Cir. 2007) (holding that a misdemeanor violation of 8 U.S.C. § 1324(a)(2)(A) qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)); *see also Padilla*, 130 S. Ct. at 1488-1489 (Alito, J., concurring) (noting that "the term 'aggravated felonies' can include misdemeanors" under 8 U.S.C. § 1101(a)(43) (quoting McWhirter, American Bar Ass'n, *The Criminal Lawyer's Guide To Immigration Law: Questions And Answers* 146 (2d ed. 2006))).

with an intent to defraud or deceive element categorically qualified as an offense involving fraud or deceit under Section 1101(a)(43)(M)(i)). Therefore, under the rationale applied by the Ninth Circuit, legal permanent residents would be deportable for numerous state and local criminal tax crimes—many of which are based on the federal tax code, and therefore specify a wide variety of "willful" and "false" tax crimes. *See, e.g.*, Del. Code Ann. tit. 30, § 574 (directed to a "person" who "willfully makes and subscribes" a return or document that the person "does not believe to be true and correct as to every material matter"); D.C. Code § 47-4106 (same); Ala. Code § 40-29-114 (same); Va. Code Ann. § 58.1-1815 (punishing a person who "willfully fails to collect or truthfully account for and pay over" certain taxes).

Furthermore, the same result applies to corporate criminal tax provisions. Under 26 U.S.C. § 7701(a)(1), a "person" includes a corporation, and 26 U.S.C. § 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." Under the Ninth Circuit's holding, all federal, state, and local "willful" corporate criminal tax violations involving false information also would lead to deportation of corporate officers or employees via Section 1101(a)(43)(M)(i).

That outcome would be especially extreme given that many of the federal, state, and local "willful" offenses for providing "false" information are *misdemeanors*. For instance, Section 7207 provides that it is a misdemeanor for "[a]ny person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be

fraudulent *or* to be false as to any material matter" (emphasis added). A violation of Section 7203 is also a misdemeanor that could "involve fraud or deceit" under the Ninth Circuit's expansive ruling, merely because Section 7203 punishes the willful failure to file a tax return, pay taxes, pay estimated taxes, keep required records, or supply required information—a provision for which prosecutions have increased eight percent in the last year alone. *See* Transactional Records Access Clearinghouse, *Prosecutions for April 2011* (July 19, 2011), *available at* http://trac.syr.edu/tracreports/bulletins/tirs/monthlyapr11/fil/ (last visited Aug. 12, 2011).

Similarly, in California it is a misdemeanor to willfully provide false information when applying to reduce a property tax assessment. Cal. Rev. & T. Code § 1610.4. Under North Dakota law, knowingly making a false statement when filing an estate tax return is a misdemeanor. *See* N.D. Cent. Code § 57-37.1-16. And in Columbus, Ohio, knowingly filing a false municipal tax return is a fourth-degree misdemeanor punishable by a $250.00 fine. *See* Columbus, Oh., City Code § 361.31(a)(4), (b), (d). Under the Ninth Circuit's ruling, *all* of these different federal, state, and local tax offenses would justify deportation under Section 1101(a)(43)(M)(i).

In many of these cases, the monetary ($10,000 loss) threshold set in Section 1101(a)(43)(M) will not prevent deportation—given that common misstatements under Section 7206 and other "willful" tax crimes involving false information can easily result in a $10,000 total tax loss. A tax revenue loss calculation can span as many as six years, with the total "loss" to the government

calculated as the aggregate tax losses for all such years.[10] For example, a California resident who commits a misdemeanor by willfully providing false information in an attempt to lower property taxes, or a resident of Columbus, Ohio, who makes a misdemeanor false statement on a municipal tax return, easily could cause a loss to the government of $3,000 in taxes per year for four years, or over $10,000 in taxes in just one year.[11]

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[10] *See* 26 U.S.C. § 6531(2), (3), (5) (setting six-year statute of limitations for violations of §§ 7201, 7206(1) and (2), and 7207); *id.* § 6531 (setting three-year statute of limitations for other tax crimes); *see, e.g.*, *United States* v. *Clarke*, 562 F.3d 1158, 1160 (11th Cir. 2009) (noting that "[a] federal grand jury subsequently returned a three-count indictment charging Clarke with willfully filing false tax returns for tax years 2000 (Count One), 2001 (Count Two), and 2002 (Count Three), all in violation of 26 U.S.C. § 7206(1)").

[11] As another example, if a hypothetical legal permanent resident taxpayer with $40,000 of taxable income in 2010 willfully and falsely claimed to be a "head of household" with a "dependent" (because, for instance, the taxpayer lived with his or her domestic partner and the partner's child), the government would suffer a yearly revenue loss of approximately $1,700. This estimate is based on an extra head of household exemption of $2,700, an extra dependent exemption of $3,650, and a resulting marginal tax rate of 15% rather than 25%. *See* 26 U.S.C. §§ 2(b), 152; *see also* IRS Publication 501, at 9, 23 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p501.pdf (last visited Aug. 12, 2011); IRS Publication 17, at 256-258 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf (last visited Aug. 12, 2011). If the taxpayer also had wrongfully claimed these same exemptions for each of the five prior years as well, the tax loss to the government would exceed $10,000—leading to deportation under the rationale of the Ninth Circuit.

Stretching the scope of Section 1101(a)(43)(M) to cover these many different tax crimes would be inconsistent with Congress's purpose in enacting that provision. When expanding the definition of an "aggravated felony" in 1993, Congress made clear that it wanted "to include ... immigration related crimes such as alien smuggling, *specified white collar crimes* and various other *extremely serious crimes*." 140 Cong. Rec. H11291, H11293 (daily ed. Oct. 7, 1994) (statement of Rep. Mazzoli) (emphases added).[12] It did just that by "specifying" the white collar offense of tax evasion in Section 1101(a)(43)(M)(ii). At the same time, it did nothing to even remotely suggest that it intended to include all types of "willful" tax crimes involving the provision of "false" information, including misdemeanor offenses, as "other extremely serious crimes" covered by Section 1101(a)(43)(M)(i). Likewise, in 1996, when lowering the loss threshold for Section 1101(a)(43)(M)(ii) from $200,000 to $10,000, Congress explained that it was doing so "for crimes of tax evasion *and* fraud and deceit." H.R. Conf. Rep. No. 104-828, at 223 (1996) (emphasis added). Notably, Congress did *not* say it was doing so "for crimes of fraud and deceit, such as tax evasion," as the Ninth Circuit's construction suggests.

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[12] Before 1993, an "aggravated felony" under Section 1101(a)(43) included "murder, any illicit trafficking in any controlled substance ..., or any illicit trafficking in any firearms or destructive devices ..., any offense ... relating to laundering of monetary instruments[], or any crime of violence ... for which the term of imprisonment imposed ... is at least 5 years, or any attempt or conspiracy to commit any such act" in violation of federal, state, or foreign law. 8 U.S.C. § 1101(a)(43) (1992).

In the end, by blurring distinctions between "extremely serious crimes" involving "fraud or deceit" on the one hand, and "lesser" federal, state, and local "willful" false information tax crimes (including mere misdemeanors) on the other hand, the Ninth Circuit has imposed a tax regime with "penalties"—namely deportation—that are far more severe than Congress ever intended.

B. The Ninth Circuit's Decision Will Impede Tax Enforcement

Expanding the list of deportable "aggravated felonies" to include all federal, state, and local tax convictions for willfully providing false information will further complicate tax enforcement at the federal, state, and local levels by reducing the frequency of plea agreements for tax offenses and increasing the frequency of tax enforcement trials.

For example, it often is far easier for the government to obtain a conviction under Section 7206(1) or (2)[13] than under Section 7201—in part, because Section

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[13] Over the last five years, violations of Section 7206 have been among the most frequently prosecuted tax crimes. *See* Transactional Records Access Clearinghouse, *Prosecutions for April 2011* (July 19, 2011), *available at* http://trac.syr.edu/tracreports/bulletins/tirs/monthlyapr11/fil/ (last visited Aug. 12, 2011). Section 7206(1) criminalizes the willful submission of any materially false information on a tax return—such as misstatement of the source of any income, *see United States* v. *DiVarco*, 484 F.2d 670, 672-673 (7th Cir. 1973), omission of any income, *see Siravo* v. *United States*, 377 F.2d 469, 471 (1st Cir. 1967), or any other information a jury finds material, *see United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995) (holding that materiality is a question for the jury under 18 U.S.C. § 1001); *Neder* v. *United States*, 527 U.S. 1, 19-20 (1999) (noting that *Gaudin* requires a jury to determine materiality in Title 26 cases). Further, a conviction

7201 requires proof of both a tax deficiency and fraud, while Section 7206(1) and (2) do not. *See Sansone*, 380 U.S. at 351; *United States* v. *Olgin*, 745 F.2d 263, 272 (3d Cir. 1984); *Considine*, 683 F.2d at 1287; *United States* v. *Taylor*, 574 F.2d 232, 234 (5th Cir. 1978). And while both provisions impose the same financial penalties (up to $100,000 for an individual and $500,000 for a corporation), Section 7206 provides for significantly less maximum jail time (three years versus five years).

For these reasons, the government has historically utilized Section 7206 as a mechanism to obtain plea deals for tax offenses that would have been difficult to prove as tax evasion under Section 7201.[14] This compromise allows the government to secure imprisonment and steep financial penalties under Section 7206, while allowing the accused taxpayer to face a maximum sentence under Section 7206 that is significantly shorter

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under Section 7206(2) does not even require proof of knowledge that information provided on a tax return was false. *See* 26 U.S.C. § 7206(2) (allowing conviction for aiding in submitting a false return "whether or not such falsity or fraud is with the knowledge or consent of the person" presenting the return).

[14] From 2003 to 2010, the Tax Division of the Department of Justice has authorized between 1,100 and 1,400 criminal tax prosecutions per year, with a conviction or plea bargain rate of 95% or more. Tax Division, U.S. Dep't of Justice, FY 2012 Congressional Budget 24-25, *available at* http://www.justice.gov/jmd/2012justification/pdf/fy12-tax-justification.pdf (last visited Aug. 12, 2011). Deciding to prosecute a federal tax evasion or tax falsity case requires many levels of review, including review by Internal Revenue Service agents and counsel, by the Tax Division of the U.S. Department of Justice, and by a U.S. Attorney. *See* Walters, *IRS Intelligence Division Operating Procedures: From 1040 Through Criminal Trial*, N.Y.U. 32d Ann. Inst. Fed. Tax'n, vol. 2, at 1195 (S. Theodore Reiner ed., 1974).

than the maximum sentence under Section 7201. Similarly, the government has allowed convictions for misdemeanor violations of Section 7207, rather than convictions under applicable felony criminal tax provisions, to reward cooperation with criminal tax investigations.[15]

But under the Ninth Circuit's ruling, legal permanent residents accused of any "willful" federal, state, or local tax crime involving false information will almost surely risk going to trial and possibly serving jail time—rather than plead guilty to a "lesser" crime with no or reduced jail time, but still get deported. *See Padilla*, 130 S. Ct. at 1483 ("Preserving the client's right to remaining in the United States may be more important to the client than any potential jail sentence." (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 323 (2001))). A legal permanent resident accused of willfully providing false information in violation of a federal, state, or local criminal tax provision (even for misdemeanors) is unlikely to accept *any* plea deal at the risk of deportation, thereby complicating tax enforcement at the federal, state, and local levels. The Ninth Circuit's erroneous broadening of Section

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[15] The Criminal Tax Manual of the Department of Justice describes this policy. "A misdemeanor prosecution under Section 7207 may be appropriate, however, for a defendant who cooperates fully, if the case involves an isolated false document and there are mitigating circumstances, such as evidence that the defendant immediately confessed when questioned about the document. This exception particularly applies to a lower-echelon participant in a wider scheme who agrees to cooperate fully and provide substantial assistance in the investigation and prosecution of another individual." Dep't of Justice, Criminal Tax Manual 16.06 (2008), *available at* http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2016.htm (last visited Aug. 12, 2011).

1101(a)(43)(M)(i) to reach all willful tax crimes involving falsity will thus introduce uncertainty and resistance into the settlement process, make government use of plea agreements more difficult and less frequent, create an enforcement backlog for the government and those accused of tax offenses, and interfere with efficient administration of the tax laws.

The Ninth Circuit's ruling is a matter of grave concern to those interested in the settled structure of our nation's criminal tax laws, and to those interested in the ability of the Internal Revenue Service and the Tax Division of the Department of Justice to enforce those laws. By unnecessarily sweeping all "willful" federal, state, and local tax offenses involving the provision of false information into the definition of an "aggravated felony" under Section 1101(a)(43)(M)(i), the Ninth Circuit's ruling will impede the enforcement of the tax laws, contrary to Congress's stated purposes.

CONCLUSION

The court of appeals' decision that a violation of 26 U.S.C. § 7206(1) or (2) is an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) should be reversed.

Respectfully submitted.

ROBERT S. FINK
KOSTELANETZ
& FINK, LLP
Seven World Trade Center
250 Greenwich Street
34th Floor
New York, NY 10007
(212) 808-8100

RICHARD W. O'NEILL
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
richard.o'neill@wilmerhale.com

HEATHER D. SCHAFROTH, PH.D.
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

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PETITION FOR RE-HEARING

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In The Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR REHEARING

Edward O.C. Ord
Jenny Lin
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

Thomas J. Whalen*
**Counsel of Record*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin
& Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Petitioners, Akio and Fusako Kawashima, hereby petition for rehearing of the decision of the Court in *Kawashima v. Holder*, 132 S. Ct. 1166 (2012), issued February 21, 2012.

In that decision, the Court held that the convictions of the Kawashimas under 26 U.S.C. § 7206 were crimes/offenses involving fraud or deceit and, therefore, were aggravated felonies and deportable offenses under 8 U.S.C. § 1101(a)(43)(M)(i).

In reaching that decision, the Petitioners respectfully submit, the Court made rulings that are contrary to prior decisions of the Court, that will have far-reaching consequences in regard to United States tax enforcement, and that may not have been foreseen by the Justices. *See City of Detroit v. Murray Corp. of Am.*, 357 U.S. 913, 913-15 (1958) (Frankfurter, J., dissenting to the denial of a petition for rehearing) (stating that a mistaken and not fully considered departure from Court precedent should be a basis for a grant of rehearing). The Court's opinion contains four significant departures from Court precedent, each of which merit rehearing.

SUMMARY OF GROUNDS FOR REHEARING

I

For the first time, the Court has held that the statute defining the crime of conviction does not necessarily determine whether the crime of conviction is an aggravated felony under 8 U.S.C. § 1101(a)(43):

> Although the words "fraud" and "deceit" are absent from the text of § 7206(1) and are not themselves formal elements of the crime, it does not follow that this offense falls outside of Clause (i). The scope of that clause is not limited to offenses that include fraud or deceit as formal elements.

Kawashima, 132 S. Ct. at 1172.

II

The Commissioner of Internal Revenue, for more than 30 years, has followed the practice rooted in established case law that a conviction of tax evasion under 26 U.S.C. § 7201 estops the taxpayer from contesting fraud in a civil fraud assessment proceeding under 26 U.S.C. § 6663. This practice may no longer be available to the Commissioner, because, as the Court has now held, a conviction under § 7201 does not necessarily involve fraud.

The decision of the Court also runs counter to the universally accepted principle held in Government tax enforcement circles, academia, and lower courts that a conviction under § 7201 is a conviction of tax fraud. Contrary to this principle, the Court held, "that the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit." *Kawashima*, 132 S. Ct. at 1175 (emphasis in original).

III

The Court's holding that making a false statement on a federal tax return "necessarily involves fraud or deceit" is contrary to the decision of the Court in *Bridges v. United States*, 346 U.S. 209 (1953).

IV

If § 7206 "necessarily involves fraud or deceit," taxpayers may be reluctant to plead guilty under § 7206 for fear that they may be collaterally estopped from contesting fraud in the civil assessment proceeding under 26 U.S.C. § 6663. The holding of the Court in *Kawashima* is contrary to the governing precedent to date that a conviction under § 7206 is not a fraud conviction and will not collaterally estop the taxpayer from contesting fraud. *See, e.g., Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982); *Comm'r's Acquiescence*, 1988–2 CB 1.

As a result, the unwillingness of taxpayers to enter a plea agreement for § 7206 violation for fear that they will be estopped from contesting fraud in

the civil assessment proceeding will hinder tax enforcement.

These holdings run counter to Court precedent and will invariably spawn taxpayer litigation and undermine the Commissioner's practice of seeking a civil fraud penalty after a conviction of tax evasion.

ARGUMENT

I

The Court recognized the well-established principle that in considering whether a crime is an aggravated felony under 8 U.S.C. § 1101(a)(43), one must look at "the statute defining the crime of conviction" to determine whether the crime of conviction. *Kawashima*, 132 S. Ct. at 1172. The Court further recognized that fraud and deceit are not "formal" elements of the crime of conviction under § 7206. *Id.* In fact, fraud and deceit are not elements of the crime at all. The Government does not have to establish "fraud" or "deceit" to obtain a conviction under § 7206. Section 7206 is a tax perjury statute.

This case is the first case decided by the Court which held that the elements of a crime do not necessarily determine whether the crime of conviction is an *aggravated* felony.

The Court held that (M)(i) should be construed "broadly." *Id.* at 1172-73. Because deportation is such a drastic consequence, the Court has traditionally sought a bright line approach as to

what is an aggravated felony, consistent with principles of due process and the rule of lenity. In this case, the Court departs from such approach by its characterization of (M)(i) as "clear enough," *id.* at 1176, and by broadening the scope of (M)(i) to capture for deportation any crime, state or federal, tax or otherwise, where fraud or deceit was somehow involved in the conduct of the perpetrator, a construction which could not have been intended by Congress, which sought to deport only criminal aliens guilty of the most serious crimes.

In this case, the Court held that it can disregard the elements of the crime of § 7206 because a conviction under § 7206 "necessarily involves fraud or deceit." It is probably true that people who are convicted of underreporting their income in violation of § 7206, in almost all cases, are trying to mislead and deceive the Government. In rare cases, however, fraud or deceit is not "involved" in a § 7206 conviction. It is not an element of the crime. For example, many taxpayers in the 1970s who objected to United States' participation in the Vietnam war refused to pay taxes to support that war, but nevertheless accurately reported their income and deductions. They claimed no taxes were owed because the United States should not be involved in an "unjust war." These taxpayers signed the return to the effect that "no taxes were owing" and violated § 7206, even though no one was deceived. Some "taxpayers" in protest even told the Commissioner where to garnish their funds. They simply did not want to voluntarily support the war.

In this case the Court did not look at the "statute" defining the crime, but rather looked to assumed facts that fraud or deceit was involved. Taking that approach to its logical conclusion, an offense which does not have fraud or deceit as an element of the crime could be an aggravated felony, if, in the course of committing the crime, the perpetrator committed some act of fraud or deceit. For example, if the perpetrator is convicted of driving under the influence (DUI) and in the course of the crime misrepresented his condition to arresting officers by some deceitful conduct, does (M)(i) make the crime an aggravated felony, even though the elements of the crime do not include fraud or deceit and even though DUI has been held not to be an aggravated felony? *See, e.g., Leocal v. Ashcroft* 543 U.S. 1 (2004). Similarly, if "fraud" or "deceit" need not be an element of the crime to be an aggravated felony under (M)(i), what then are the "elements" of the "offense" in (M)(i)?

In answer to that question, the Court appears to be holding that, *unlike* every other "aggravated felony" decision, (M)(i) does not, in fact, require the presence of the elements of the crime – as long as there is some "fraud or deceit" involved. The Court said (M)(i) is "not limited to offenses that include fraud or deceit as formal elements." *Kawashima*, 132 S. Ct. at 1172. This is a dramatic departure from the Court's uniform line of cases and previous jurisprudence that the elements of the crime of conviction determine whether the crime of conviction is an aggravated felony.

II

The Court, for the first time, also held that fraud is not a necessary element of a conviction under § 7201 (tax evasion). The Commissioner, lower U.S. Courts and legal writers have without exception stated that tax evasion is criminal tax fraud. *See, e.g., Mertens Law of Federal Income Tax* § 6039 (2011); *Gray v. Comm'r*, 708 F.2d 243 (6th Cir. 1983); *Klein v. Comm'r*, 880 F.2d 260 (10th Cir. 2010).

Legal writers are in accord:

> It is a generally recognized principle that a conviction for criminal tax evasion under § 7201 estops the tax payer from subsequently denying the specific intent requirement of civil fraud under § 6663, although it does not estop the petitioner from disputing the amount of the underpayment.

Casey Federal Tax Practice § 152.50 (2011); *see also* Kenneth E. North, *Criminal Tax Fraud* § 25.13 (3d ed. 1998).

The Court, however, has now held that a conviction under § 7201 may not involve fraud with the result being that a conviction under § 7201 may no longer be used to estop the taxpayer from contesting fraud in the civil assessment proceeding.

The Court quotes *United States v. Scharton*, 285 U.S. 518 (1932), for the proposition that tax

evasion may not involve fraud or an attempt to defraud. The quote, however, set forth by the Court does not appear to support that proposition. The Court noted:

> [I]n an indictment for evasion, an "'averment [of intent to defraud] would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat."

Kawashima, 132 S. Ct. at 1175 (*citing Scharton*, 285 U.S. at 521). The Court appeared to be saying in *Scharton* that a willful attempt to evade or defeat is equivalent to an intent to defraud and that an averment of intent to defraud would be surplusage. Accordingly, *Scharton*, if anything, seems to support the principle that fraud is an element of tax evasion.

Scharton has mostly been cited for the proposition that "excepting language," which did not include the word "fraud," should be strictly construed. Because of its narrow holding, the *Scharton* decision has been rarely cited. The Government's position that Congress relied on *Scharton* is pure fantasy.

Section 7201 requires proof of fraud whether the action deals with assessment or payment. *Sansone v. United States*, 309 U.S. 343 (1965).

The Court noted that "§ 7201 includes two offenses: 'the offense of willfully attempting to evade or defeat the *assessment* of a tax as well as the offense of willfully attempting to evade or defeat the

payment of a tax.'" *Kawashima*, 132 S. Ct. at 1175 (citation omitted). The Court held that "it is possible to willfully evade or defeat payment of a tax under § 7201 without making any misrepresentation." *Id.* The Court then provided an example: "§ 7201 can be violated by a taxpayer who files a truthful tax return, but who also takes affirmative steps *to evade payment* by moving his assets beyond the reach of the Internal Revenue Service." *Id.* (emphasis added). The Court then leaped to the *non sequitur* that "it is still true that the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit." *Id.*

It is the Petitioners' contention, buttressed by years of decisions, that the willful intent to evade or defeat, whether in assessment *or* payment cases, necessarily involves "fraud." It is for that reason that there have been "no actual instances of indictments for tax evasion unaccompanied by any act of fraud or deceit." *Id.* at 1179 (Ginsburg, J., dissenting) (citation omitted). Congress actually provided two sections covering those offenders who did not pay tax, but did so *without fraud*: 26 U.S.C. §§ 7202-03. Those convicted of these statutes did not pay over the tax owed, but did not necessarily do so by fraud. If, however, an offender did not pay tax by "evading payment" as the Court hypothesized, it must be by fraud since the offender *evaded*. Most respectfully, it is difficult to conclude from these facts, as the Court does, that "therefore 'it is still true that the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit." *Id.* at 1175.

III

In holding that the filing of a false statement in a tax return necessarily involves fraud or deceit, the Court departs from the Court's previous decision in *Bridges v. United States*, 346 U.S. 2009 (1953). In *Bridges*, the Court noted:

> The offense there charged is that Bridges knowingly made a false material statement in a naturalization proceeding. In that offense, as in the comparable offense of perjury, fraud is not an essential element, although fraud often accompanies it.

346 U.S. at 222. The holding of the Court in *Kawashima* that filing a false statement under the pain of perjury necessarily involves fraud or deceit is a drastic departure from the precedent of *Bridges*.

The Court held:

> Mr. Kawashima's conviction under § 7206(1) establishes that he knowingly and willfully submitted a tax return that was false as to a material matter. He therefore committed a felony that involved "deceit."

Kawashima, 132 S. Ct. at 1172.

The Court held in *Bridges* that making a false statement (such as on a tax return) is not enough to imply an intent to deceive. Proof is required that the conduct was *intended* to deceive. Section 7206 is a tax perjury statute and no finding is necessary that someone was deceived or that there was an intent to deceive, which is what makes a conviction under § 7206 much easier for the Commissioner.

Contrary to its holdings in the past, the Court, in the case at bar, appears to hold that proof of intent to deceive is unnecessary in crimes involving false statements to the Government. The Court now holds that fraud or deceit can be assumed in the case of a false statement to the Government. Such a holding conflicts with *Bridges* and more importantly destroys the distinction between tax evasion under § 7201 and filing a false statement under § 7206.

IV

This Court's decision in holding that a conviction under § 7206 necessarily involves fraud or deceit will mean that lawfully admitted aliens may no longer be willing to risk deportation by pleading guilty to § 7206. The Commissioner will need to go to trial. The ramifications for the Tax Division of the Department of Justice will be enormous. *See, e.g.*, Walters Br. 19 n.14. Additionally, U.S. Citizens will similarly decline to plead guilty to a § 7206 claim where "fraud" or "deceit" may, as a matter of evidence, be used to support a civil fraud penalty.

The Government has utilized § 7206 to obtain a criminal conviction because it avoids the need to

prove fraud or deceit. Now, with this "fraud and deceit" gloss on § 7206, the Government will no doubt have difficulty in obtaining plea agreements – if, as a result of the present case (fully recognizing that the Court found deceit in the case at bar), a conviction of § 7206 may collaterally estop the taxpayer from denying fraud, in a civil tax fraud proceeding. The Court's decision in *Kawashima* reverses (no doubt unintentionally) the established law and practice that a conviction under § 7206 is not a conviction of fraud. *See, e.g., Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982); *Comm'r's Acquiescence*, 1988–2 CB 1; *Cox v. Comm'r*, T.C.M. 1985-324, 1985 Tax Ct. Memo LEXIS 307, (July 2, 1985).

This major departure from current and established tax practice will prejudice U.S. Tax enforcement policies.

CONCLUSION

This decision, if not reconsidered, will not be easily distinguished in subsequent cases because of these four rulings, which were essential to the Court's ultimate conclusion. The impact of this decision on immigrants and Government tax enforcement will be enormous.

Petitioners respectfully urge the Court to reconsider this decision and rehear the case.

March 16, 2012

Respectfully submitted,

Thomas J. Whalen*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin &
Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
* *Counsel of Record*

Edward O.C. Ord
Jenny C. Lin
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

No. 10-577

In The

Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,

Petitioners,

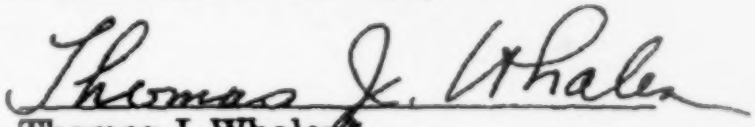
v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

CERTIFICATE OF COUNSEL

On this 16th day of March, 2012, I, Thomas J. Whalen, pursuant to Rule 44.1, hereby certify that the accompanying Petition for Rehearing is presented in good faith and not for delay.



Thomas J. Whalen*
**Counsel of Record for Petitioners*
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com